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EXECUTIVE PRIVILEGE: ABOUT THIS ISSUE AND THE AUTHORS

ANDREW P. MURPHY, JR.*

This special issue of the Federal Bar Journal on Executive Privilege results from a series of discussions on this subject among the Editors which were initiated by the publication in 1954 of two issues of the Journal on "Congressional Hearings and Investigations." During the planning and preparation of those two issues, one of the important and stimulating problems under consideration concerned the production of documents and papers by the Executive Branch of the Government and the privilege of the Executive Branch to keep confidential such papers and information which it deemed required secrecy.

In an article in that issue entitled "Memorandum on Separation of Powers," Attorney General Brownell clearly set forth the issues involved in this problem and reviewed the precedents that our Presidents, members of their Cabinets, and other heads of executive departments have set on refusing to disclose papers and information which require secrecy for reasons of public policy. The Attorney General stated that the basis of this privilege was grounded on the public interest and the safety of the Nation. He pointed out that the courts have held that whether the production of papers contrary to the public interest was a matter for the Executive Branch to determine.

Mr. Conrad Philos wrote for that same issue an excellent article entitled "Executive Privilege and the Release of Military Records." He also succinctly described the problem. The public interest, he said, is the first and paramount consideration in determining whether a record should be released, and may require either the disclosure or the nondisclosure of a record. Mr. Philos outlined three categories of records in the possession of the executive agencies which must be considered privileged in nature. He described these categories as follows:

- (1) A record which affects a military or state secret;
- (2) A record which represents a communication between officials and attorneys of a Department; and
- (3) A document which is privileged because it qualifies as a departmental record.

Since the publication of the earlier work on Congressional Hearings, the Editors of the Journal have felt that an entire issue of the Journal should be devoted to this one subject. The increased interest in the issues inherent in this subject by the public as well as the Congress and the Executive Branch of the Federal Government has underscored its importance. This issue, then, represents the extensive interest the Editors have had in this subject and will continue to have in order to serve the best interests of the public as well as the legal profession.

Few would disagree with the view that the production of papers and information and the privilege to withhold such by the Executive Branch of the Government must be based on the interest of the public and national safety.

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Many different views have been offered from time to time, however, as to how the public interest and national safety should be interpreted by the Executive Branch in deciding whether a certain document or piece of information should be withheld from the public. It is clear that military secrets essential to national defense should properly be withheld from public view. Communications between officials and attorneys of a department have such a confidential nature in themselves that their privileged nature is only infrequently challenged.

Considerable controversy has been developed, however, over the release of "departmental records" by Federal agencies. Just where to draw the line in deciding which "departmental records" must be withheld in the public interest on the basis of Executive Privilege has been a difficult task to administer.

It is the purpose of the Federal Bar Journal in publishing this issue to assure a thorough expression of different opinions on this vital problem of inter-governmental relationships.

THE AUTHORS

Senator Thomas C. Hennings, Jr., Chairman of the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, is a well-known authority on Constitutional law. Senator Hennings graduated from Cornell University, received his law degree from Washington University and was awarded an Honorary Doctorate of Laws from Central College in 1954. He is a member of the Missouri Bar and has served as District Attorney of St. Louis, Missouri. He is a member of the American Judicature Society, the American, Missouri, and St. Louis Bar Associations and Chairman of the Rules and Administration Committee of the U. S. Senate.

Congressman John E. Moss, who has written an introduction to this issue, is a member of the House of Representatives Government Operations Committee and Chairman of its Subcommittee on Public Information. The extensive work of Mr. Moss and his Subcommittee has been a major factor in stimulating discussion of the problems outlined in this issue on Executive Privilege and has set in motion strong currents towards the solution of this problem. Before coming to the United States Congress, Mr. Moss was a member of the California State Assembly and served in the United States Navy during World War II.

Mr. Leonard Niederlehner, who has written an introduction to this issue from the Executive Branch viewpoint, is Deputy General Counsel of the Department of Defense. He received his Bachelor of Laws degree from the University of Ohio in 1937, where he was a member of the Order of Coif. Mr. Neiderlehner is a member of the Ohio and Supreme Court Bars.

Mr. Clark Mollenhoff brings to this issue an extraordinary background and experience in the field of public information. Mr. Mollenhoff is a correspondent for the Des Moines Register and the Washington Bureau of Cowle publications. He is a member of the Iowa Bar and the American Bar Association. In 1949-50 he attended Harvard University as a Nieman Fellow. A member of Sigma Delta Chi, Mr. Mollenhoff has been the recipient of a number of outstanding awards in his field. Among those are the Washington Correspondents Award in 1953 and 1955, the Heywood Brown Memorial Award in

1956, the Raymond Clapper Memorial Award in 1956, and the Sigma Delta Chi Public Service Award in 1958. He also received the Pulitzer Prize in 1958 and has been closely identified with the subject of freedom of information for over ten years. He has been a member of the American Society of Newspaper Editors Freedom of Information Committee and the Freedom of Information Committee of Sigma Delta Chi. In 1952, he served on the Advisory Committee of the late Senator Blair Moody of Michigan.

Mr. J. R. Wiggins, who brings the publisher's viewpoint to this symposium, is Vice President and Executive Editor of the Washington Post and Times Herald. Mr. Wiggins was formerly editor, St. Paul Pioneer Press and St. Paul Dispatch and formerly Assistant to the Publisher, New York Times. In 1954, he was Lovejoy Fellow at Colby College and in 1957, the recipient of the John Peter Zenger award from the University of Arizona. Mr. Wiggins is presently serving as First Vice President and Member of the Board of Directors of the American Society of Newspaper Editors. He is author of *Freedom or Secrecy*, published by the Oxford University Press in 1956.

Mr. Daniel J. McCauley, Jr. is Associate General Counsel of the Securities and Exchange Commission. Mr. McCauley is a graduate of LaSalle College and Pennsylvania Law School, and a member of both the Federal Bar Association and the Pennsylvania Bar Association. He was in private practice in Philadelphia, Pennsylvania, prior to his assuming his present post with the Securities and Exchange Commission. He formerly served as Special Deputy Attorney General, Pennsylvania Securities Commission and has had an outstanding career in the legal profession. Mr. McCauley has done a great deal of research in this particular subject and his views are a very valuable addition to this issue.

Mr. Conrad Philos is a General Editor of the Federal Bar Journal and has been a valuable member of its Editorial Board for several years. Author of the article entitled "Executive Privilege and the Release of Military Records" which appeared in the January-March, 1954 symposium on Congressional Hearings and Investigations, Mr. Philos has written many authoritative legal articles and books. He is a member of the Illinois State and Federal Bar Associations and presently is Consultant to The Judge Advocate General, Department of the Army.

Although he does not appear as an author in this issue, the Editors of the Journal wish to extend their appreciation to John Mitchell who is Counsel to the Subcommittee on Public Information, House Government Operations Committee. Mr. Mitchell has worked tirelessly in connection with this issue and has personally been a strong factor in the lively discussions of the problems presented here. Mr. Mitchell has also given a great deal of valuable advice and time to the compilation of the articles contained here.

INTRODUCTION: A LEGISLATOR'S VIEW EXECUTIVE PRIVILEGE—PUBLIC'S RIGHT TO KNOW

JOHN E. MOSS *

The Federal Bar Journal and the Federal Bar Association are performing a valuable public service by providing, in this issue, an opportunity for the full expression of different points of view on the important and timely subject of Executive Privilege. This is a subject with which I have been closely associated and directly concerned as chairman of the Special Subcommittee on Government Information of the House Committee on Government Operations.

More than 170 years ago the Founding Fathers of this Nation put down on paper the charter for a country to be governed by laws rather than royal prerogative. These men and their forebears knew only too well that the freedoms they had fought to obtain would be lost if they failed to establish the fact that the people of the new nation meant to be their own governors. From personal experience gained during Colonial days, these men understood the necessity for a written proclamation to spell out a system of government by laws instead of government by men. They also knew that in order to be self governing under a system of laws, it was necessary for the people to be fully informed about the affairs of government at all levels—the legislative, the executive and the judicial.

There has been, in recent years, a sharp reduction in the amount of information available to the people about the Executive Branch of government. The great expansion of the Federal Government, the experience of two World Wars and a continuing cold war have tended to increase government power in the hands of the Executive Branch. With this increased power, there has been a growing control of government information by Federal officials and an assumption of the authority to decide what information will be made available to the people and the Congress.

There has been a marked tendency on the part of too many Federal officials in the military departments to overclassify information—to make available only self-serving information on successes while omitting facts about mistakes and failure. No one denies the necessity for true security measures in the interest of national defense, but our security system is greatly endangered by the tendency to classify information which has no true security value.

Almost as dangerous as the misuse of the security system is the broad extension of the claim of "executive privilege" to restrict information. It is my firm conviction that very recent claims of "executive privilege" by responsible heads of government are so broadly stated as to constitute a real and present danger to our system of representative government. A discussion of this important problem is most timely.

The Federal Government is in possession of much information which should not be made public, but the Constitution provides the means for protecting such information by entrusting to the Congress the responsibility to make laws spelling out necessary protections. In 1952 the Supreme Court, in the famous Youngstown Steel Seizure Case, set forth in unmistakable terms the roles of the Executive and Legislative Branches:

* Member of U. S. Congress—Representative, 3d Congressional District, California. For biographical sketch, see p. v.

* * * In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. The first section of the first article says that 'All legislative powers herein granted shall be vested in a Congress of the United States * * *'. After granting many powers to the Congress, article I goes on to provide that Congress may 'make all Laws which shall be necessary and proper for carrying into Execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.'¹

Many individuals both inside and outside government fail to recognize that sweeping claims of "executive privilege" have no basis in law nor in the Constitution. The late Mr. Justice Robert Jackson, a former Attorney General, recognized this fact when he concurred with the statement of Circuit Judge Maris who spoke for a unanimous court, in the Reynolds case, in these words:

Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one Government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to Government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed, the privilege against disclosure might gradually be enlarged by Executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities.

"We need to recall in this connection the words of Edward Livingston: 'No nation ever yet found any inconvenience from too close an inspection into the conduct of its officers, but many have been brought to ruin, and reduced to slavery, by suffering gradual imposition and abuses which were imperceptible, only because the means of publicity had not been secured.' And it was Patrick Henry who said that 'to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man and every friend of his country.'²

As the following articles are read, it will be well to keep in mind two important questions:

First, does granting access to information invade the powers and prerogatives of the Executive Branch? Second, does granting access to information interfere with the making of administrative decisions or the functions commonly associated with an executive official?

¹ Youngstown Sheet & Tube Co., et al. v. Sawyer, 343 U.S. 587, 588.

² Reynolds v. U. S., 192 F. 2d 995.

INTRODUCTION: AN EXECUTIVE BRANCH VIEW EXECUTIVE PRIVILEGE—PUBLIC'S RIGHT TO KNOW

LEONARD NIEDERLEHNER *

The subject of the availability of information has received extensive treatment from the lawyer's point of view, in numerous legal publications. From the policy point of view, it has received a great deal of attention from the Congress and the Press. It is well that the topic be subjected to discussion and scrutiny. However, it is doubtful that the issues involved will soon be settled with finality either from the legal or the policy point of view because they narrow to issues of judgment of responsible Government officers; and there appears little likelihood that there will develop an appropriate forum other than public opinion to adjudicate the differences.

In theory, it seems possible for students to agree upon fundamental principles, except for some extremes. It is in the application of fundamental principles to individual cases that questions arise.

Everyone should be able to agree on the basic principle that a democracy can only exist in a climate of enlightened public opinion and, further, that the conduct of the public business must be subject to public scrutiny so that administrators may account for the discharge of their responsibilities.

However, this principle, just as every other fundamental principle of our Government, is subject to limitations which derive from a balance of consequences. Justice Holmes once explained that "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."¹

One limitation on the availability of information which finds general support in principle is the necessity for the protection of information relating to the national security which may be of benefit to a potential enemy or the release of which might be detrimental to the interests of the United States. True, this information belongs to the public, but if the Government makes it available to the citizenry generally it also makes the information available to a potential enemy. Critics express the view that too much material is classified for security reasons. This Government itself in Executive Order 10501 requires "continuing review" to assure that no information is withheld which "the people of the United States have a right to know." However, the principle of classification of defense information finds general support.

It seems possible, also, for students to agree that certain types of information not related to classified security information justifiably require protection in the public interest. Some of this is covered by specific statute and some is not. The articles which follow discuss these in detail. There is a distinct rationale upon the basis of which each of these types of information is safeguarded from general disclosure. It is noteworthy that some of the categories of information have a recognized "privileged" status in the dealings of private parties as distinct from their treatment by the agencies of Government.

* Deputy General Counsel, Department of Defense. For biographical sketch, see p. v.

¹ Schenck v. U. S., 249 U.S. 47, 52 (1919).

The most controversial category of all safeguarded information supplies the title of this Symposium, the so-called "executive privilege." This term has gained a particular meaning from the assertion of the Executive of the right to safeguard information in the discharge of his responsibilities under the Constitution, his exercise of the executive power. Most frequently the term relates to the non-availability of preliminary thoughts as distinguished from final official acts by responsible officials; advising and consulting among staff members which involves the free and candid interchange of preliminary views; and recommendations from subordinates to superiors, particularly those not as yet acted upon. It is submitted that the term "executive privilege" is a misnomer in the sense that the necessity for protecting preliminary or advisory information or consultations is accepted by the legislative and judicial branches of the Government as well as by the executive; and the protection of certain types of information may involve not the exercise of a privilege but rather the application of a principle of orderly administration. The legislative branch employs "executive" sessions of its Committees. Judge and juries deliberate in private. The judiciary protects its agreed opinions until the appointed time for announcement.

The title of the Symposium relates executive privilege to the people's right to know. It is noteworthy that in the well-known recent example, the President's letter to the Secretary of Defense dated May 17, 1954, the so-called executive privilege was asserted with respect to a request of the legislative branch of the Government. The flow of information between the branches of the Government would appear to be a vital aspect of the people's need to know. A study of information practices would appear to be incomplete without a study of the constitutional separation of powers and the assertion of this separation in support of refusals to make available information. Here again it is submitted that a study of the executive practice is but a facet of the entire problem. Is the executive's assertion of the right to protect the preliminary documents relating to his final official action in the conduct of his business completely distinct from the legislature's assertion of its control over its documents? In response to a subpoena duces tecum from the United States District Court of the District of Columbia, the House in House Resolution 427 of the 81st Congress asserted "that by the privileges of this House no evidence of a documentary character under the control and in the possession of the House of Representatives can, by the mandate of process of the ordinary courts of justice, be taken from such control of possession but by its permission. . . ." ²

How do the actions of the executive and of the legislative compare with the assertion by the judiciary of its independence of the other branches?

In June, 1953, Judge Louis E. Goodman, speaking for the seven Federal Judges of the Northern District of California, refused to answer certain questions by a House Judiciary Subcommittee, investigating the actions of the courts in that District. He stated that to do so would "make the judiciary subservient to the Legislative Branch of the Government." With respect to judicial proceedings, he stated "the Constitution does not contemplate that such matters be

² See also H.Res. 341, 84th Congress.

reviewed by the Legislative Branch but only by the appropriate appellate tribunals. The integrity of the Federal courts, upon which liberty and life depend, require that such courts be maintained inviolate against the changing moods of public opinion." ³

The studies of the activities of the Executive Branch which follow are certainly worthy of the attention given them, and it is submitted that the reader, while considering the central theme of the executive privilege, should bear in mind the illustrations of the legislative and judicial privilege which are cited above.

³ See The New York Times, June 2, 1953, page 22.

THE EXECUTIVE PRIVILEGE AND THE PEOPLE'S RIGHT TO KNOW

THOMAS C. HENNINGS, JR.*

When the President recently signed the freedom of information bill enacted by the 85th Congress,¹ there was laid to rest an insidious secrecy practice which had developed in the government in recent years whereby the so-called federal "housekeeping statute" was cited by executive departments and even some of the independent agencies as authority to withhold information from the public.²

At the same time he helped to lay one unlawful secrecy practice to rest by signing the freedom of information bill, however, the President in an accompanying statement raised the specter of another, which, if allowed to grow unchecked, could become a much greater danger to our democratic system of self-government than the misuse of the "housekeeping statute" ever has been.

When he signed the freedom of information bill, the President said:³

I have today signed the bill H. R. 2767, to amend Section 161 of the Revised Statutes with respect to the authority of Federal officers and agencies to withhold information and limit the availability of records. The purpose of this legislation is to make clear the intent of Congress that Section 161 of the Revised Statutes shall not be cited as a justification for failing to disclose information which should be made public.

In its consideration of this legislation the Congress has recognized that the decision-making and investigative processes must be protected. *It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an Executive department to keep appropriate information or papers confidential in the public interest. This power in the Executive Branch is inherent under the Constitution.* (Italics supplied.)

* United States Senator, State of Missouri. For biographical sketch, see p. v.

¹ Act of August 12, 1958, (Hennings-Moss Act) 72 Stat. 547 (1958). This statute makes it clear that REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952), (Federal Housekeeping Statute), does not authorize executive department heads to withhold information from the public. 5 U.S.C. § 22 (1958), reads:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

The Hennings-Moss Act adds to section 22 the sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public."

² See S. Rep. No. 1621, 85th Cong., 2d Sess. 3 (1958), where it is stated: "Despite the obvious 'housekeeping' nature and purpose of section 161, it has been openly cited in recent years by a number of executive departments and agencies as authority for withholding information from the public and limiting the availability of records to the public."

"The Committee has found that this section has been specifically cited as such authority by the following executive departments: Department of Agriculture, Department of Defense, Department of Interior, Department of Justice, Department of Labor, Department of State, and Post Office Department". See also H.R. Rep. No. 1461, 85th Cong., 2d Sess. (1958).

Independent agencies found to have cited section 22 as authority to withhold information from the public included the Civil Service Commission, the Federal Mediation and Conciliation Service, the Housing and Home Finance Agency, the Interstate Commerce Commission, and the Smithsonian Institute. See *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 1, at 28 (1958).

³ White House press release, August 12, 1958.

The President did not indicate precisely what he meant by "appropriate information or papers," or from whom such information or papers are permitted to be kept "confidential," or who is empowered to determine what is "in the public interest," but the broad nature of his statement lends strong support to the conclusion that he completely endorses the startling and dangerous thesis advanced by the Attorney General to the effect that the President and the heads of the executive departments, and all those in the Executive Branch to whom they delegate it, have an unlimited power to withhold from both the Congress and the public any information or papers which they in their own discretion decide should be withheld.⁴ This power, said to be "inherent under the Constitution," is referred to generally as the "Executive privilege."⁵

Much has already been said and written about the power of the President and his subordinates in the Executive Branch of the government to withhold information from the Congress.⁶ Considerably less attention has been given to the power of the President and his subordinates under the Constitution to withhold information from the public. Yet, it is this latter aspect of the subject which seems to present the more vexing constitutional problems, since any broad "Executive privilege" to withhold information from the public must operate in direct derogation of the people's natural and constitutional right to know what the government is doing (or not doing, as the case may be).

It is the purpose of this article to explore the nature and basis of the people's "right to know" and to measure against it the so-called "Executive privilege" to withhold information from the public. In this way, it is believed, the "privilege" can best be seen in its proper constitutional perspective, and its allowable scope may more accurately be determined.

THE PEOPLE'S RIGHT TO KNOW

Freedom of information about governmental affairs is an inherent and necessary part of our political system. Ours is a system of self-government—and

⁴ The doctrine of an unlimited "Executive privilege" to withhold information from the Congress was enunciated by the present Attorney General in 1956 when, as Deputy Attorney General, he issued a 102 page mimeographed "study" entitled: "Is a Congressional Committee Entitled to Demand and Receive Information and Papers from the President and the Heads of Departments Which They Deem Confidential, in the Public Interest?" See Memorandums of the Attorney General Compiled by the Subcommittee on Constitutional Rights, *The Power of the President to Withhold Information from the Congress* (Printed for the use of the Committee on the Judiciary, 1958). In this "study", which bears a striking resemblance to a series of articles published in the Federal Bar Journal seven years earlier (see Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B. J. 103, 223, 319 (1949), reprinted in *Hearings*, supra note 2, at 147-270), the Attorney General said: "... The rule may be stated that the President and heads of departments are not bound to produce papers or disclose information communicated to them where, in their own judgment, the disclosure would, on public considerations, be inexpedient." (Memorandums, supra, at 70 (Cf. Wolkinson, supra, at 348; *Hearings*, supra, at 268).) This doctrine later was extended by the Attorney General to include withholding information from the public when he testified before the Senate Constitutional Rights Subcommittee on March 6, 1958 (*Hearings*, supra note 2, at 26-27), and in a letter to Representative George Meader, dated March 14, 1958 (*Id.* at 56-58).

⁵ See *Hearings*, supra note 2, *passim*.

⁶ E.g., Wolkinson, supra note 2; Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L. J. 477 (1957); Memorandums of the Attorney General, supra note 2; Note, 43 GEO. L. J. 634 (1955); STAFF OF SPECIAL SUBCOMM. ON LEGISLATIVE OVERSIGHT OF HOUSE COMM. ON INTERSTATE AND FOREIGN COMMERCE, 85TH CONG. 1ST SESS., RIGHT OF ACCESS BY SPECIAL SUBCOMMITTEE ON LEGISLATIVE OVERSIGHT TO CIVIL AERONAUTICS BOARD FILES AND RECORDS (Subcomm. Print 1957); STAFF OF HOUSE COMM. ON GOVERNMENT OPERATIONS, 84TH CONG. 2D SESS., THE RIGHTS OF CONGRESS TO OBTAIN INFORMATION FROM THE EXECUTIVE AND FROM OTHER AGENCIES OF THE FEDERAL GOVERNMENT (Comm. Print 1956).

self-government can work effectively only where the people have full access to information about what their government is doing.⁷

History shows that the Founding Fathers were keenly aware of this fundamental truth when they wrote the Constitution. Behind them was the experience of the English people, who for several centuries had been struggling for greater control over their government, and who in 1771 and 1772, as a result of that struggle, finally had managed to establish the right to have made public the debates of their Parliament.⁸

By 1787, the year the Constitution was written, there had developed in England the concept of a right in the people to know what their government was doing.⁹ There can be no doubt that the framers of our constitution recognized the existence of such a right and were strongly influenced by it in writing both the original Constitution and the Bill of Rights.¹⁰

When the original Constitution came to be written, no explicit provision was made concerning the people's "right to know." The explanation for this seems to be that the right to know, like many other fundamental rights, was

⁷ In the words of James Madison: "Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both." Quoted in LASSWELL, NATIONAL SECURITY AND INDIVIDUAL FREEDOM 62-63 (1950). The same point is made in ANGELL, THE PRESS AND THE ORGANIZATION OF SOCIETY 17 (1922), where it is stated: "If a people are to be in a position to judge the conduct of their government, to decide whether it is doing well or ill, to decide the merits of public policy at all; if, indeed, they are to preserve the capacity for sound judgment, they must have facts before them not only as the government would have them put, but also as those who disagree with the government may desire to put them."

⁸ See 1 ANSON, LAW AND CUSTOM OF THE CONSTITUTION 158 *et seq.* (3rd ed. 1897).

⁹ See *Grosjean v. American Press Co.*, 297 U.S. 233 (1946), where, after discussing various attempts by the English government to tax newspapers and advertisements prior to the adoption of the First Amendment, the Supreme Court said (at 247): "Citations of similar import might be multiplied many times; but the foregoing is enough to demonstrate beyond peradventure that in the adoption of the English newspaper stamp tax and the tax on advertisements, revenue was of subordinate concern; and that the dominant and controlling aim was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs. It is idle to suppose that so many of the best men of England would for a century of time have waged, as they did, stubborn and often precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but to establish and preserve the right of the English people to full information in respect of the doings or misdoings of their government." (Italics supplied).

After referring to the English struggle to establish and preserve the people's "right . . . to full information," the Court in the *Grosjean* case mentioned several unsuccessful attempts by the Massachusetts legislature to tax newspapers, magazines and advertisements, and went on to say (at 248): "The framers of the First Amendment were familiar with the English struggle, which then had continued for nearly eighty years and was destined to go on for another sixty-five years, at the end of which time is culminated in a lasting abandonment of the obnoxious taxes. The framers were likewise familiar with the then recent Massachusetts episode; and while that occurrence did much to bring about the adoption of the amendment . . . the predominant influence must have come from the English experience."

¹⁰ *Ibid.* See also CHAFEE, HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION, *passim*. (1952). Statements by some of those who took part in or influenced the writing of the Constitution and the Bill of Rights are illustrative on this score. See statement by James Madison, who played a leading role in writing both the Constitution, and was chairman of the committee which drafted the First Amendment, *supra* note 7. Thomas Jefferson, as much the father of our constitutional system as any man, stated (with reference to Shay's Rebellion): "The way to prevent these irregular interpositions of the people, is to give them full information of their affairs through the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people." Quoted in LASSWELL, *op. cit. supra* note 7, at 62.

then so much for granted that it was deemed unnecessary to include it.¹¹ Some of the express terms of the original Constitution, however, demonstrate an obvious intent to keep secrecy in government at a minimum; and by clear implication they show a recognition of the people's right to information about their government.

The Preamble of the Constitution reads, in part:

We the People of the United States . . . do ordain and establish this Constitution for the United States of America.

These words affirm the basic principle upon which our government was founded, namely, that it is the people who are sovereign and who have granted the Congress, the President, and the Judiciary their powers under the Constitution.¹² Since, under our theory of government, sovereignty resides in the people, it logically and necessarily follows that the people have a right to know what the government—which they themselves established—is doing, and that government officials properly may interfere with the free exercise of that right only to the extent the people themselves consent. Thus, while it is not mentioned, the people's right to know is an implicit part of the Preamble of the Constitution.

Article I, section 5 (clause 3) of the Constitution contains further recognition and protection of the people's right to know. That section provides:

Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal. . . .

As the Supreme Court has stated, the clear purpose of this provision is to insure publicity to the proceedings of the legislature, and a correspondent responsibility of the members to their respective constituents.¹³ Secrecy in legislative proceedings is permitted, but, it is important to note, only as an exception to a general requirement of full disclosure.

Finally, in Article II, section 3 of the Constitution there can be found additional evidence that the Founding Fathers recognized the right of the people to know about the activities of the government. That section reads:

[The President] shall from time to time give to the Congress Information of the State of the Union. . . .

¹¹ Chafee, *supra* note 10, at 3: "The Philadelphia Convention deliberately refrained from inserting any bill of rights in their document because they thought it unnecessary."

¹² "The words 'people of the United States' and 'citizens' are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the 'sovereign people,' and every citizen is one of this people, and a constituent member of this sovereignty." Scott v. Sandford (The Dred Scott Case), 19 How. 393, 404, (1857). DOUGLAS, THE RIGHT OF THE PEOPLE (1950), at 21, says: "The compact of the Constitution is a compact of We The People. The ultimate political power is in the people. They can alter, revise, or undo what they created any time they choose. While the compact lasts, the various agencies of government are responsible to the people. The people elect their law-makers and their Chief Executive for limited terms only. Those who exercise authority must have it recurringly renewed at the hands of the people. The people are, indeed, the final repository of all power."

¹³ Field v. Clark, 143 U.S. 649, 670 (1892), quoting 1 STORY CONSTITUTION § 840 (3d ed. 1858).

The language of this section is mandatory and imposes on the President a positive *duty* to provide information to the Congress.¹⁴ Nothing is said in this section about the President's giving information to the public, but this omission, if that term may be used accurately, would seem to reinforce the conclusion that the right to know was so much taken for granted by the Founding Fathers that it was not deemed necessary to include it in the original Constitution.¹⁵ To argue otherwise, it would seem, would be to say that since the Constitution does not specifically require it, the President is obliged to give *no* information to the public—a position which even the most ardent advocates of the "Executive privilege" doctrine do not take.¹⁶

When in 1791 the Bill of Rights was added to the Constitution, whatever doubt might otherwise have existed about the recognition and protection of the people's right to know under the Constitution was removed. Even more clearly than the original Constitution, the Bill of Rights, particularly the First Amendment, shows a recognition of the right to know.

The First Amendment reads, in part:

Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

Without question the free speech and press clause of the Bill of Rights was intended to serve as a guarantee of the people's right to acquire information about the activities of the government.¹⁷ Implicit in its terms is a right to knowledge, including knowledge about what the government is doing.¹⁸ James Madison, who played a leading role in writing the amendment, made this very

¹⁴ In the discharge of this duty, the President customarily has sent to the Congress an annual message, and, in addition, special messages as he has deemed them necessary or desirable. See *The Constitution of the United States, Analysis and Interpretation*, S. Doc. No. 170, 82d Cong., 2d Sess. 462 (1953).

¹⁵ See notes 8, 9, 10, *supra*.

¹⁶ E.g., *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d. Sess., pt 1 at 5 (1958) where Attorney General Rogers, a leading exponent of the Executive privilege doctrine, testified: "With reference to the right of the public to know generally as distinguished from the legislative branch, it seems to me that there are four principles which it is well to keep in mind:

"1. While the people are entitled to the fullest disclosure possible, this right like freedom of speech or press, is not absolute or without limitations. Disclosure must always be consistent with the national security and the public interest.

"2. In recognizing a right to withhold information, the approach must be not how much can legitimately be withheld, but rather how little must necessarily be withheld. We injure no one but ourselves if we do not make thoughtful judgments in the classification process.

"3. A determination that certain information should be withheld must be premised upon valid reasons and disclosure should promptly be made when it appears that the factors justifying nondisclosure no longer pertain.

"4. Nondisclosure can never be justified as a means of covering mistakes, avoiding embarrassment, or for political, personal or pecuniary reasons."

¹⁷ See *Grosjean v. American Press Co.*, 297 U.S. 233, 250 (1936). "The predominant purpose of the grant of immunity here invoked was to preserve an untrammelled press as a vital source of public information . . . since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."

¹⁸ That a right need not be mentioned specifically in the Constitution to be considered a constitutional right and to be protected as such is demonstrated by the treatment afforded recently by the Supreme Court to the "right to travel." See *Kent v. Dulles*, 357 U.S. 116 (1958), where a majority of the Court held that the right to travel is a constitutional right which "is part of the 'liberty' of which the citizen cannot be deprived without the due process of law of the Fifth Amendment."

point shortly after the First Amendment was adopted when he said with reference to it: ". . . the right of freely examining public characters and measures, and of free communication thereon, is the only effective guardian of every other right."¹⁹ Judge Cooley expressed the same thought many years later when he said in his classic work on the Constitution:²⁰

"The evils to be prevented [by the First Amendment] were not the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential to prepare the people for an intelligent exercise of their rights as citizens.

The Supreme Court has yet to recognize explicitly the "right to know" as a constitutional right, but the Court has given strong indication that it deems such a right to exist, both as a natural right protected by the Ninth Amendment²¹ and as a constitutional right protected by the First Amendment.²² In *Grosjean v. American Press Co.*,²³ where the scope of the protection afforded by the First Amendment was in issue, the Court took occasion to refer to the century-long struggle of the English people "to establish and preserve the right . . . to full information in respect of the doings or misdoings of their government,"²⁴ (Italics added.) and concluded that the predominant influence which brought about the adoption of the First Amendment must have come from this English experience. The Court referred also to "the natural rights of the members of an organized society, united for their common good, to impart and acquire information about their common interests,"²⁵ and stated that ". . . the predominant purpose of [the free speech and press clause of the First Amendment] was to preserve an untrammelled press as a vital source of public information."²⁶ The Court added that "since informed public opinion is the most potent of all restraints upon misgovernment, the suppression or abridgment of the publicity afforded by a free press cannot be regarded otherwise than with grave concern."²⁷

From these words, it seems only reasonable to conclude that if faced with the precise issue, the Supreme Court would recognize the right to know as a right which is within the protection of the First Amendment as well as the Ninth.²⁸

The broad scope of protection which the Court probably would afford to the right to know as part of the free speech and press guarantee of the First Amendment is indicated by the "preferred position" doctrine enunciated by

¹⁹ 6 WRITINGS OF JAMES MADISON 398 (1906).

²⁰ 2 COOLEY, CONSTITUTIONAL LIMITATIONS 886 (8th ed. 1927).

²¹ U.S. Const. Amend. IX: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

²² For a collection and discussion of various cases in point, see Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L. J. 209 (1951).

²³ 297 U.S. 233 (1946).

²⁴ *Id.* at 247.

²⁵ *Id.* at 243.

²⁶ *Id.* at 250.

²⁷ *Ibid.*

²⁸ For further discussion of this point, see Parks, *The Open Government Principle: Applying the Right to Know under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957).

the Supreme Court in recent years respecting First Amendment rights.²⁹ Under that doctrine, freedom of speech and press has been held to occupy a "preferred position" in the scale of constitutional values, so that laws restricting those rights are not afforded the presumption of constitutionality traditionally given other legislation.³⁰ Before such laws are to be held valid a clear and present danger must be shown.³¹ In the light of this doctrine respecting First Amendment rights, it is to be expected that the people's right to know would be afforded a preferred position, and that any law or other governmental action impinging on that right would have to meet the clear and present danger test before being held valid.

THE "EXECUTIVE PRIVILEGE" TO WITHHOLD INFORMATION

Having preliminarily explored and determined the nature and scope of the people's constitutional right to know, we may now properly consider the nature and scope of the "Executive privilege" under the Constitution to withhold information from the people. As indicated above, only in this way can the privilege be seen in its correct constitutional perspective. The reason for this becomes clear if we hark back to the basic principle expressed in the Preamble of the Constitution, that it is the *people* who are sovereign, and the various branches of the government possess only those powers which the people have given them in the Constitution, either expressly or by implication.³² Once this principle is accepted—and it forms the cornerstone on which our government is built—the scope of any Executive power under the Constitution, including any "privilege" to withhold information from the public, obviously must be determined in the light of all the rights and privileges the people have reserved to themselves or provided protection for in the Constitution, including the right to know.

Before turning to a consideration of the constitutional basis for the Executive privilege to withhold information from the public, however, it should be useful to note, and thus, perhaps, to eliminate—one common source of confusion concerning the Executive privilege doctrine. Proponents of the Executive privilege frequently cite the constitutional doctrine of separation of powers to support the alleged power of the President and his subordinates to withhold information from both the Congress and the public.³³ Without

²⁹ See *Thomas v. Collins*, 323 U.S. 516 (1945); *Thornhill v. Alabama*, 310 U.S. 88 (1940); *Cantwell v. Connecticut*, 310 U.S. 296 (1940). See also Mason, *The Core of Free Government*, 1938-40; *Mr. Justice Stone and "Preferred Freedoms"*, 65 YALE L. J. 597 (1956), *passim*.

³⁰ *Ibid.* See also, *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

³¹ *Ibid.*

³² See note 12, *supra*.

³³ Typical of the instances in which an "executive privilege" has been said to exist with regard to both the Congress and the public, and such executive privilege has been said to be based on the separation of power doctrine, is a letter from the Attorney General to Representative George Meader, dated March 14, 1958. See *Hearings before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong., 2d Sess., pt. 1, at 56-58 (1958). In his letter, the Attorney General said: "You will notice in my statement [before the subcommittee] that I gave full recognition to the existence of like legislative and judicial privileges based fundamentally on the constitutional separation of powers as is the executive privilege," then went on to say, "... You might consider the consequences if such executive, legislative, or judicial privileges did not exist, if the executive could not assert under the Constitution a privilege against unrestricted legislative and public inquiry."

attempting to pass judgment on the ultimate merit of this proposition as it applies to withholding information from Congress, it can be said that as it is applied to the Congress such an argument has at least some plausibility. However, to invoke the separation of powers of doctrine to support any privilege of the President to withhold information from the public would clearly seem to be erroneous, since that doctrine deals with the relationship among the legislative, executive and judicial branches of the government, and not the relationship between the people and the government.³⁴ To whatever extent any Executive privilege to withhold information exists vis-a-vis the public, it must be founded on some other constitutional principle or authority.

Nowhere in the Constitution is the President expressly given power to withhold information from the people. That such a constitutional power must exist in certain circumstances, however, cannot realistically be denied.

Under Article II of the Constitution, the President is vested with the executive power, and he not only is given the duty "to take care that the laws be faithfully executed" (with discretion as to how he discharges that duty), but is made the Commander in Chief of the Armed Forces, and given various other powers, both express and implied, including the exclusive power to represent the United States with regard to other nations. It is inescapable that the proper and effective exercise of some of the powers and duties given to the President under the Constitution requires secrecy under certain circumstances. To the extent that this is so, it would seem that the Constitution by necessary implication gives the President power in certain cases to withhold information from the public.³⁵

Probably the best example of a constitutional power of the President necessarily involving some secrecy for its effective exercise is his power in the field of foreign affairs. It is easy to imagine the harm that could result to the nation as a whole if everything the President and his representatives did or said in conducting our foreign affairs was done in public.

The Supreme Court already has recognized a need for secrecy in the conduct of foreign affairs, and has indicated that it recognizes a constitutional power in the President to withhold information pertaining to such matters from both the Congress and the public, where the national interest demands it.³⁶ The Court has said, in the *Curtiss-Wright* case:³⁷

In this vast external realm [of foreign affairs], with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He makes treaties with the advice and consent of the Senate; but he alone nego-

³⁴ See also, *United States v. Reynolds*, 345 U.S. 1 (1953), where the Supreme Court declined to pass on the argument advanced on behalf of the Government that there is an inherent executive power to suppress documents which is protected in the constitutional system of separation of power.

³⁵ For a discussion of the separation of power doctrine and its functions, in our scheme of government, see *O'Donoghue v. United States*, 289 U.S. 516 (1933).

³⁶ The Supreme Court has held on several occasions that the general language of Article II of the Constitution was tailored to give the President broad executive powers to perform his constitutional duties. See *Myers v. United States*, 272 U.S. 52 (1926); *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

³⁷ *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

³⁸ *Id.* at 319.

tiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. . . . The Senate Committee on Foreign Relations at a very early day in our history (February 15, 1816), reported to the Senate, among other things, as follows:

"The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations and must necessarily be most competent to determine when, how and upon what subjects negotiation may be urged with the greatest prospect of success. For his conduct he is responsible to the Constitution. The committee consider this responsibility the surest pledge for the faithful discharge of his duty. They think the interference of the Senate in the direction of foreign negotiations calculated to diminish that responsibility and thereby to impair the best security for the national safety. The nature of transactions with foreign nations, moreover, requires caution and unity of design, and their success frequently depends on secrecy and dispatch." U.S. Senate, Reports, Committee on Foreign Relations, Vol. 8, p. 24.

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution . . . Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of its productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiations of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. In his reply to the request, President Washington said:

"The nature of foreign negotiations requires caution, and their success must often depend on secrecy; and even when brought to a conclusion a full disclosure of all the measures, demands, or eventual concessions which may have been proposed or contemplated would be extremely impolitic; for this might have a pernicious influence on future negotiations, or produce immediate inconveniences, perhaps danger and mischief, in relation to other powers. The necessity of such caution and secrecy was one cogent reason for vesting the power of making treaties in the President, with the advice and consent of the Senate, the principle on which that body was formed confining it to a small number of members. To admit, then, a right in the House of Representatives to demand and to have as a matter of course all papers respecting a negotiation with a

foreign power would be to establish a dangerous precedent." 1 Messages and Papers of the Presidents, p. 194.

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both Houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information 'if not incompatible with the public interest.' A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

These words by the Supreme Court seem clearly to give judicial sanction to the doctrine of "Executive privilege" as a doctrine of necessity in the field of foreign affairs, both as to the Congress and the public. The power to withhold information apparently is viewed as a necessary incident to the "very delicate plenary and exclusive power of the President" to conduct foreign affairs.

The need for secrecy thus acknowledged to exist in the conduct of foreign affairs, and the constitutional power to withhold information implied therefrom, undoubtedly pertain also to some other powers and duties given the President under the Constitution. Among these, for example, would be certain powers and duties of the President as Commander in Chief of the Armed Forces. Clearly to perform his wartime duties as Commander in Chief properly, even in the absence of legislation by the Congress, the President must at times act in secret and at least temporarily withhold information from the public. The safety of the nation would demand this.³⁸

³⁸ An illustrative example is presented in *Totten v. United States*, 92 U.S. 105 (1876). There the Court said, with regard to a contract made between President Lincoln and the plaintiff whereby the plaintiff had acted as a secret agent for the President during the Civil War (at 106):

"We have no difficulty as to the authority of the President in the matter. He was undoubtedly authorized during the war, as commander-in-chief of the armies of the United States, to employ secret agents to enter the rebel lines and obtain information respecting the strength, resources, and movements of the enemy; and contracts to compensate such agents are so far binding upon the government as to render it lawful for the President to direct payment of the amount stipulated out of the contingent fund under his control. Our objection is not to the contract, but to the action upon it in the Court of Claims. The service stipulated by the contract was a secret service; the information sought was to be obtained clandestinely, and was to be communicated privately; the employment and the service were to be equally concealed. Both employer and agent must have understood that the lips of the other were to be forever sealed respecting the relation of either to the matter. This condition of the engagement was implied from the nature of the employment, and is implied in all secret employments of the government in time of war, or upon matters affecting our foreign relations, where a disclosure of the service might compromise or embarrass our government in its public duties, or endanger the person or injure the character of the agent. If upon contracts of such a nature an action against the government could be maintained in the Court of Claims, whenever an agent should deem himself entitled to greater or different compensation than that awarded to him, the whole service in any case, and the manner of its discharge, with the details of dealings with individuals and officers, might be exposed, to the serious detriment of the public. A secret service, with liability to publicity in this way, would be impossible; and, as such services are sometimes indispensable to the government, its agents in those services must look for their compensation to the contingent fund of the department employing them, and to such allowances from it as those who dispense that fund may award. The secrecy which such contracts impose precludes any action for their enforcement . . ."

Thus, there seems little question that under the Constitution the President by necessary implication has the power to withhold some information from the public. But the fact that the President possesses such power, and obviously must exercise some discretion as to whom to employ it, does not mean, as some proponents of the Executive privilege doctrine assert,³⁹ that such power or discretion is unlimited or may be delegated to any and all subordinates.

To begin, the power to withhold information must, in the words of the Supreme Court in the *Curtiss-Wright* case, "like every other governmental power . . . be exercised in subordination to the applicable provisions of the Constitution."⁴⁰ The President cannot, for example, withhold information if by so doing he were to usurp or infringe a power given exclusively to the Congress under the Constitution.

Further, since whatever power he possesses under the Constitution to withhold information from the public is in direct derogation of the people's right to know, the President may not withhold information if by doing so he in any way were to trespass on the protections afforded the right to know in the Constitution, either expressly or by implication. As set forth above, the right to know is given broad protection in the Constitution, particularly in the free speech and press clause of the First Amendment, and the President's power to withhold information is circumscribed accordingly.

In addition, the power to withhold information, being one implied from the Constitution on the ground of necessity, exists only where it is clearly essential. Since the power is implied as a necessary corollary to some other power, it may be exercised only when the effective exercise of some other power requires it. Thus, even in the field of foreign affairs, where the Supreme Court has recognized a need for secrecy, the power to withhold information exists only to the extent that the effective and proper exercise of the President's power to conduct the foreign affairs of the nation requires it. As regards foreign affairs matters not requiring secrecy in the national interest, there is no power to withhold.

From the foregoing, it may be seen that the President's power to withhold information from the public is indeed an executive "privilege"—not a right—which has relatively narrow limits. Circumscribed as it is by the protections afforded the people's right to know in the Constitution, particularly in the free speech and press clause of the First Amendment, and limited further by the protection afforded First Amendment rights under the "preferred position" doctrine, the Executive privilege to withhold information from the public would seem to exist only in cases where it is necessary in the effective exercise of another Executive power and where divulgence of information would constitute a "clear and present danger" to the national interest. In the absence of enabling legislation by the Congress, information may be withheld from the public by the President only when these two tests are met.

Placed in this framework of limitation, the Executive privilege assumes its correct constitutional position, and there is achieved between the people's

³⁹ *Supra* note 4.

⁴⁰ *Supra* note 36 at 320.

right to know and the requirements of the nation's safety the desirable balance referred to by Patrick Henry during the debates prior to the adoption of the Constitution, when he said:⁴¹

The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them . . . I am not an advocate for divulging indiscriminately all the operations of government, though the practice of our ancestors, in some degree, justifies it. Such transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish to be published, till the end which required their secrecy should have been effected. But to cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man. . . .

⁴¹ 3 Elliot's Debates 170 (1787).

THE RIGHT TO KNOW AND ENFORCEMENT PROBLEMS IN A REGULATORY AGENCY

DANIEL J. McCAULEY, JR. *

The statutory provision which has been the principal subject of interest and concern on the part of the proponents of the public's right to know is REV. STAT. § 161 (1875).¹ This provision applies to the departments in the executive branch of the Government. It does not apply to boards and agencies which are not under the control of an executive department.² REV. STAT. § 161, as amended by the 85th Congress, provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. *This section does not authorize withholding information from the public or limiting the availability of records to the public.*"³ (Emphasis supplied)

The amendatory sentence, which likely is the most brief enactment of the 85th Congress, is apt to be the subject of more comment per word than any other legislative action of that Congress. Within seven days after the enactment of the amendment, Hon. John E. Moss of California, one of the leading Congressional proponents of the right to know, inserted in the Congressional Record his comments on the statement made by the President when he signed the bill.⁴ The President, in commenting on the amendment, stated that it was clear from the legislative history of the bill "... that it is not intended to, and indeed could not, alter the existing power of the head of an executive department to keep appropriate information or papers confidential in the public interest." The President concluded these remarks by adding: "This power in the executive branch is inherent under the Constitution."⁵

Congressman Moss allowed little time to elapse before joining issue on this statement reserving Executive Privilege from the scope of the amendment. He challenged what he characterized as "... the absurdity and the dangers of this Government-wide claim of 'executive privilege' ...", and took the position that if there is any such Constitutional Privilege it is reserved to the President

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¹ 5 U.S.C. § 22 (1952).

² 22 OPS. ATT'Y GEN. 62 (1898); 26 OPS. ATT'Y GEN. 209 (1907); 29 OPS. ATT'Y GEN. 209 (1911).

³ The last sentence was added to REV. STAT. § 161 on August 12, 1958, as Public Law 85-619, 72 STAT. 547 (1958). It was originally introduced as H.R. 2767 85th Cong., 2d Sess. (1958) by Hon. John E. Moss of California.

⁴ 104 CONG. REC. A7448 (1958) (Remarks of Congressman Moss). In addition to his own remarks Congressman Moss introduced an analysis of Executive Privilege by Harold L. Cross, counsel for the American Society of Newspaper Editors, which had been printed in the August issue of the Bulletin of The American Society of Newspaper Editors.

⁵ Ibid.

alone and does not devolve upon his subordinates.⁶ Specifically, however, on the question of the relationship between the amendment and Executive Privilege, Congressman Moss acknowledged in his remarks that: "... the legislation has absolutely nothing to do with that particular issue ..."

The question of what information should be available to the Congress as the representative of the people is one separate and apart from the problem of what information in government files should be available to litigants in court cases. It is the latter problem to which this article will be addressed. However, some general observations on the former question are appropriate in view of some recent developments in the activities of at least one subcommittee.

Some observers were of the opinion that the groundwork for a possible court test of the validity of Executive (or agency) Privilege was being laid during the days prior to the opening of the Second Session of the 85th Congress. In September, 1957, investigators of the Special Subcommittee on Legislative Oversight of the House Committee on Interstate and Foreign Commerce⁷ began examining the files of various independent federal regulatory agencies.⁸ It was not long before there was a conflict of opinion between some of the agencies, on the one hand, and personnel of the subcommittee on the other, as to the depth to which subcommittee investigators were entitled to probe. The first open conflict developed with the Civil Aeronautics Board early in October, 1957. The CAB issued written instructions to its employees with respect to the manner of handling various types of inquiries by subcommittee investigators. The CAB was called before the Subcommittee to account for the action which it had taken.

As the hearing opened on October 17, 1957, there was distributed a Memorandum of Law which the committee staff had prepared, consisting of 61 printed pages, supplemented by a 20-page appendix.⁹ However, the full Subcommittee avoided joining issue with the CAB at the hearing on the legal question of forcing disclosure of everything in CAB files. Near the end of the hearing an atmosphere of harmonious understanding developed between the members of the Subcommittee and the CAB and the hearing concluded on that note. Thereafter, neither the agencies nor the Subcommittee disturbed the understandings which were reached by negotiation.

The stage had been set for a test of the privilege question, but it was obvious that the full Subcommittee preferred to avoid a head-on clash. The author believes it reasonable to predict, however, that it will not be long before efforts are made in the Congress to enact legislation tending to whittle down

⁶ Ibid. Mr. Moss stated: "If any Constitutional 'privilege' exists to keep secret the facts of government, it is certainly granted only to the President himself and certainly not to his appointees, heading offices which are not even mentioned in the Constitution."

⁷ The original Chairman of the Special Subcommittee on Legislative Oversight was Hon. Morgan M. Moulder of Missouri. He was succeeded by the Chairman of the Parent Committee, Hon. Oren Harris of Arkansas.

⁸ The inquiry by the Subcommittee has been restricted to the "big six" agencies—Interstate Commerce Commission, Federal Trade Commission, Federal Power Commission, Federal Communications Commission, Civil Aeronautics Board, and Securities and Exchange Commission.

⁹ Subcommittee print, Memorandum of Law, "Right of Access by Special Subcommittee on Legislative Oversight to Civil Aeronautics Board Files and Records," 85th Cong., 1st Sess., dated October 17, 1957 (97734). The CAB instructions to its employees appear at pages 64 and 65 of the Memorandum.

or eradicate the concept of Executive Privilege. It seems a safe surmise that President Eisenhower's comment upon signing this bill was intended to give notice that he will be alert to any future attempt to encroach upon the Executive Privilege, which, incidentally, he has asserted on several occasions.¹⁰

While other papers in this symposium may explore more fully the question of Executive Privilege, we prefer to limit this discussion to an examination of the problem which the right to know theory presents to departments and agencies which perform enforcement functions.

Although it tends to beg the question to urge that law enforcement cannot be carried on effectively "in a goldfish bowl", it is just as simple as that. As a consequence, departments and agencies of the Federal Government long have resisted the efforts on the part of "outsiders" to penetrate the confidentiality of the Government's investigative files. It is our purpose to comment on some of the successes and some of the failures in this area.

FEDERAL PRIVILEGE AGAINST STATE ENCROACHMENT

In the leading case of *Boske v. Comingore*¹¹ the United States Supreme Court refused to permit the Commonwealth of Kentucky to obtain from a federal Collector of Internal Revenue file copies of reports which were in his possession. The reports contained information regarding the amount of whiskey which the defendant, in the Commonwealth's action in the State Court, had withdrawn from its bonded warehouse. The refusal to deliver the copies of the reports was based upon a Treasury Department regulation adopted pursuant to the recently amended REV. STAT. § 161. The Supreme Court sustained the validity of the regulation and held that REV. STAT. § 161 was consistent with the Constitution.

Aside from the question of a departmental or agency regulation, where there is a conflict with a state governmental agency, a federal agency also has available as a defense the federal immunity against state interference. This issue was squarely raised in *United States v. Owlett et al.*,¹² a case wherein the United States obtained an injunction restraining the Senate of the Commonwealth of Pennsylvania from investigating the Works Progress Administration.

In view of the fact that in the *Owlett* case there were definite political overtones,¹³ the case serves to point up the basic necessity for recognition of a fundamental federal privilege. With respect to federal immunity, however, it is more than likely that in the future the broad doctrine will be somewhat

¹⁰ See the Subcommittee's Memorandum of Law and the Attorney General's memorandum printed in the Appendix thereto (at page 67, et seq.). Those interested are also referred to 26 GEO. WASH. L. REV. 1, 23 (1957), two articles by the late Dr. Wallace Parks. See also Bishop, *The Executive's Right of Privacy: An Unresolved Constitutional Question*, 66 YALE L.J. 477 (1957); Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 FED. B.J. 103, 223, 319 (1949), an excellent historical treatment of the subject.

¹¹ 177 U.S. 459 (1900). This case was a habeas corpus proceeding. The Collector had refused to produce reports from federal files in an action in the state court by the Commonwealth of Kentucky to collect taxes from Block. Upon refusal he was taken into custody by the Sheriff of Kenton County, Kentucky.

¹² 15 F. Supp. 736 (M.D. Pa. 1936).

¹³ The named defendant, the late G. Mason Owlett, was for several years Republican National Committeeman from Pennsylvania where he was a very influential member of the State Senate which usually has a Republican majority.

limited by the effect of some of the cases which have been decided more recently. It is difficult to see why state governmental agencies should be foreclosed from obtaining access to materials which have been held to be available to some individuals. This would seem so particularly in cases where the state and the federal governments are parties to the litigation.

GOVERNMENT PRIVILEGE IN CIVIL LITIGATION

In civil cases, as distinguished from criminal cases, the privilege of protection from disclosure,¹⁴ for one reason or another, has been preserved to a greater extent. However, in civil cases the courts have tended to protect the privilege more often and more fully in cases where the Government is not a party as compared with civil cases in which the Government is a party.¹⁵

A. Civil Cases Where Government Not a Party

In cases where the Government is not a party, the participating litigants have experienced a marked lack of success in obtaining access to government information. This is so whether the files were sought from departments in the executive branch which have been withheld pursuant to rules adopted under the authority of REV. STAT. § 161¹⁶ or the files of independent regulatory agencies.¹⁷ The files of such agencies are also withheld pursuant to regulations, but such regulations have been adopted pursuant to rule-making powers which such agencies have under specific statutes.

*Touhy v. Ragen*¹⁸ involved the right of an FBI agent to refuse to obey a subpoena duces tecum requiring the production of papers in his possession. The FBI agent relied upon Department of Justice Order No. 3229, adopted pursuant to REV. STAT. § 161.¹⁹ The District Court found the recalcitrant agent guilty of contempt. The Court of Appeals reversed²⁰ and its holding was affirmed.

In this case the majority left open the question of whether the Attorney General, as distinguished from a subordinate, could be required to produce called privileged documents were he properly served, and the question of the

¹⁴ This concept of a privilege not to disclose in litigation is certainly based upon broader and different grounds than the Executive Privilege mentioned above. Executive Privilege is the right of the President (and executive branches of the Government) that under the constitutional separation of powers the Executive is entitled to withhold certain types of information from the legislative branch. The privilege not to disclose in litigation is essentially evidentiary, rather than constitutional, and the courts have so treated it. It may be that in the future a case involving a Cabinet Officer, or the President himself, will arise which will place in issue the constitutional separation of powers not only as between the executive and the legislative branches but even as between the executive and the judicial branches. The possibility is believed to be extremely remote, however.

¹⁵ The author recommends most highly Timbers and Cohen, *Demands of Litigants for Government Information*, 18 U. PITT. L. REV. 687 (1957). This study is "must" reading for persons interested in the area covered by this article.

¹⁶ *Boske v. Comingore*, 177 U.S. 459 (1900); *Touhy v. Ragen*, 340 U.S. 462 (1951); *Boyle v. Sackett*, 74 F. 2d 922 (9th Cir. 1935); *Jackson v. Allen Industries, Inc.*, 250 F. 2d 629 (4th Cir. 1958).

¹⁷ *In re Appeal of Securities and Exchange Commission and William H. Timbers*, 226 F. 2d 908 (8th Cir. 1955); *Universal Airline v. Eastern Airlines*, 188 F. 2d 993 (D. C. Cir. 1951).

¹⁸ 340 U.S. 462 (1951).

¹⁹ 11 Fed. Reg. 4920 (1946); revised 18 Fed. Reg. 1368 (1953). The same order was involved in *Jackson v. Allen Industries, Inc.*, *supra* note 16. It is reproduced in the *Touhy* case, *supra* note 16, at 463 n. 1.

²⁰ 180 F. 2d 321 (7th Cir. 1950).

Cabinet Officer's privilege was directly at issue before the court. It is with respect to this question that Mr. Justice Frankfurter's concurring opinion is of interest. In his comments²¹ Justice Frankfurter specifically excluded any possible inference, at least as far as he was concerned, that "... the Attorney General can forbid every subordinate who is capable of being served by process from producing relevant documents and later contest a requirement upon him to produce on the ground that procedurally he cannot be reached." He added: "... I assume the contrary—that the Attorney General can be reached by legal process." Then he summarized his position by stating: "To hold now that the Attorney General is empowered to forbid his subordinates, though within a court's jurisdiction, to produce documents and to hold later that the Attorney General himself cannot in any event be procedurally reached would be to apply a fox-hunting theory of justice that ought to make Bentham's skeleton rattle."

The leading case involving an independent federal regulatory agency is *In Re Appeal of Securities and Exchange Commission and William H. Timbers*.²² That case involved rules of the SEC similar to executive department rules adopted under REV. STAT. § 161. The difference is merely in the fact that the independent agency adopts its rules under powers contained in the statutes which it administers.²³

The *Timbers* case actually arose out of private litigation between contending factions seeking control of Monroe Paper Products Company.²⁴ After the private suit was instituted in the District Court the case came to the attention of the SEC which proceeded to follow the litigation and, pursuant to its statutory power, initiated its own investigation into possible violations of the securities laws. When the case came on for trial plaintiffs served a subpoena duces tecum on an SEC employee at its Detroit branch office. Thereafter other Commission employees also testified, two of them voluntarily. When it appeared that it was possible that two Commission employees might be held in contempt, the SEC's General Counsel, William H. Timbers, went to Detroit to represent them. By this time the questions being directed to the witnesses had progressed far beyond the scope originally indicated. Also, by this time all of the Commission's files in the investigation were in the courtroom. The Commission filed a formal claim of privilege with respect to its files, particularly excluding from disclosure internal memoranda, staff recommendations and Commission Minutes.

For several days questions were directed to the SEC employees relating to the matters as to which the claim of privilege had been lodged. Several times during the testimony the SEC General Counsel offered the documents in question to the court. The tender was qualified so that if the trial judge decided that the documents were not privileged they would be sealed pending a decision

²¹ *Touhy v. Ragen*, 340 U.S. 462, 472-73 (1951).

²² 226 F. 2d 501 (6th Cir. 1955).

²³ The rules involved were Rule 122, 17 C.F.R. § 230.122 (1949) and Rule X-4, 17 C.F.R. § 240.0-4 (1949). In effect they prohibit employees of the SEC from making available to anyone certain information without authorization from the Commission. If an employee is served with a subpoena he is required respectfully to decline to give "confidential" information without prior authorization by the Commission.

²⁴ This litigation still continues. See *Kinsey v. Knapp*, 154 F.Supp. 263 (E.D. Mich. 1957); 232 F. 2d 458 (6th Cir. 1956) and 235 F. 2d 129 (6th Cir. 1956), cert. denied 352 U.S. 892 (1956); 249 F. 2d 797 (6th Cir. 1957), cert. denied, and writ of prohibition denied, 356 U.S. 935 (1958).

the Court of Appeals. The trial judge declined to accept the documents on this basis and finally directed that Mr. Timbers be sworn as a witness, to which he objected strenuously. In the course of this examination Timbers refused to deliver to counsel an internal Commission document. He was held in contempt of court and placed in the custody of the United States Marshal. In the course of being bound over he was denied the right to counsel and was not given a stay for the purpose of taking an appeal. Immediately an appeal and an application for a stay were filed. The stay was granted.

In an opinion which recites the facts in considerable detail, the Court of Appeals reversed the District Court. The court sustained the rule-making power of the SEC. It held that there was no valid distinction between the power of executive departments and that of independent agencies to make rules covering their files. The court went on to hold that a Commission employee, acting pursuant to Commission rules and instructions, could not be held in contempt. In addition, the court indicated that at such time that a Government employee, particularly an attorney, is likely to be held for contempt, he should be given the opportunity to obtain counsel and also he should be given a stay to file an appeal.

Throughout the trial the presiding judge made statements which could be well associated with one concerned with the public's right to know.²⁵ However, the Court of Appeals concluded that there were other motives which prompted the trial judge's penetrating examination of the SEC witnesses. The comment of the Court of Appeals on this point and its characterization of the trial judge's conduct was:²⁶

"As his remarks plainly indicate in the instant matter, District Judge Lederle apparently took the view that a part of his function was to conduct a searching inquisition into what he considered to be neglectful inaction of the Securities and Exchange Commission in relation to the Monroe Paper Product Company's affairs. We think he overstepped appropriate judicial bounds . . ." ²⁷

The foregoing cases deal with situations where the department or agency has possession and control over the document in dispute. In *Overby v. United States Fidelity and Guaranty Co.*,²⁸ the reports sought had been delivered over

²⁵ The argument of those who support the theory of the public's right to know was succinctly stated by Hon. Arthur F. Lederle, the trial judge in the *Timbers* case, *supra* note 17. He said, among other things: "It is my view that the business of all agencies of Government is public business." (Tr. 4418; Rec. 103a) Judge Lederle added: "Frankly, I see no reason why all of the files of the Securities and Exchange Commission relating to this case shouldn't be open to the attorneys on either side, I can't conceive of anything that is secret about it." (Tr. 4512, Rec. 121a).

²⁶ 226 F. 2d 501, 519.

²⁷ Incidentally, this is not the only case in which a trial judge or one or more of the parties concerned has indicated that a government agency has not pursued a matter in a satisfactory manner. However, the ultimate determination of the legal issue has, until this time, been resolved by an affirmation of the agency's right to conduct its functions without judicial interference. See *Adams v. Nagle*, 303 U.S. 532 (1938); *Wilbur v. United States*, 281 U.S. 100 (1930); *Leighton v. Securities and Exchange Commission*, 221 F. 2d 91 (D. C. Cir. 1955); *Crooker v. Securities and Exchange Commission*, 161 F. 2d 944 (2d Cir. 1947); *General Drivers, etc. v. National Labor Relations Board*, 179 F. 2d 492 (10th Cir. 1950); *Berlinsky v. Woods*, 178 F. 2d 404 (4th Cir. 1949).

²⁸ 224 F. 2d 158 (5th Cir. 1955).

by the federal authorities to the plaintiff bank. In this case the bank sued the surety on its indemnity bond. The surety served the president of the bank, prior to taking his deposition, with a subpoena duces tecum requiring that he produce certain correspondence between the bank and the federal examiners, and other federal officials, as well as copies of the bank examiner's reports for several years. The bank president refused to produce the correspondence and the reports, having been instructed by the Acting Secretary of the Treasury that the Department claimed privilege.²⁹ The claim of privilege was based upon the informers privilege, as well as REV. STAT. § 161, the National Bank Act, and the Administrative Procedure Act. Judge Rives cut through the tangled issues which always appear in these cases and held that the trial court's order to produce was too broad. He pointed out that much of the information in the reports was irrelevant, and suggested that interrogatories be directed to the Government showing in detail and with specification just what the surety company needed to set up its defense to the bank's action. The case was remanded with the sage conclusion that if and when it became necessary to get to the question of privilege that at least the issues would be very much narrowed.

Certain conclusions can be drawn at this point from the cases already discussed.

1. Where a department or agency rule prohibits an employee from disclosing information in government files, the employee will be protected against a charge of contempt if his refusal to disclose the information is based upon the instruction of his superior.

2. There is still open the question of whether or not a court will hold in contempt a department head or member of an agency if he refuses to disclose information in a file upon order to do so.³⁰

3. Much is to be gained by enforcement agencies in endeavoring to avoid the privilege question by urging vigorously the question of relevancy or materiality if appropriate. In the *Overby* case³¹ the court opened the door and demonstrated clearly the advantages of raising these evidentiary questions and not privilege alone.

B. Civil Cases Where Government is a Party

The most recent Supreme Court case on the question of disclosure in a civil matter in which the Government was a party is *United States v. Reynolds*.³² This case involved a suit under the Federal Tort Claims Act. The widows of three civilian observers who had been killed in an airplane crash sued to recover damages, and sought the production of official reports of investigation under Rule 34 of the Federal Rules of Civil Procedure. The Government moved to quash the motion for production on the ground that the investigation reports were privileged against disclosure pursuant to regulations adopted under

²⁹ The claim of privilege is reproduced in full: *Id.* at 160-61.

³⁰ During the interrogation in the *Timbers* case *supra* note 17, the SEC General Counsel at one point invited counsel for the plaintiffs to test this. It was agreed between counsel that members of the Commission would accept service of a subpoena in Washington, D.C. This would have had the effect of removing the problem from Detroit to the District of Columbia. However, plaintiff's counsel thereafter decided against this course of action.

³¹ *Supra* note 28.

³² 345 U.S. 1 (1953).

REV. STAT. § 161. The claim of privilege was rejected, and thereafter the Government filed a formal claim of privilege and urged, in addition to REV. STAT. § 161, that the airplane in question was testing secret military equipment. The District Court ordered the documents produced. When the Government persisted in its refusal the court entered an order in favor of the plaintiffs under Rule 37 (b) (2) (i) of the Federal Rules of Civil Procedure.³³ A final judgment was entered for the plaintiffs after testimony covering damages. The Court of Appeals affirmed.³⁴ The Supreme Court reversed and remanded the case.

In this case, although the allegation of privilege was also made under REV. STAT. § 161, the Supreme Court grounded its findings of privilege upon the safeguarding of military secrets.³⁵ In its discussion, the court announced a formula for determining questions of privilege.³⁶

"... Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." (Emphasis supplied.)

The Supreme Court first of all relieved Cabinet officers, department heads and agencies of the right to determine, without more, what is privileged. A claim of privilege based upon military secrets has been rendered relatively easy to decide. Courts can find sufficient comfort in this case to take judicial notice of the fact that such secrets exist, that the matter under advisement might be one of them, and therefore the Judge had better not look at it. However, privileges claimed pursuant to rules and regulations adopted under REV. STAT. § 161 in particular statutes involving regulatory agencies present less clear and more difficult problems.

A recent lower court case typical of the problem which may confront a federal department or agency when it seeks to enforce the law is *Mitchell v. Tomlin et al.*,³⁷ a case wherein the Secretary of Labor brought an action to enjoin defendants from violating the provisions of the Fair Labor Standards Act of 1949 in paying employees wages at a rate less than the statutory minimum. Defendants filed an answer denying that they had violated the law, and filed interrogatories requesting that the Secretary inform defendants as to (1) the identity of persons from whom plaintiff had obtained any report, statement, memorandum or testimony concerning the alleged violations, (2) when, where and by whom such report, statement, memorandum or testimony was obtained or made,

³³ 10 F.R.D. 468 (1950).

³⁴ 192 F. 2d 987 (1951).

³⁵ See cases cited on the military secrets privilege: 345 U.S. 1, 7, n. 11 (1953).

³⁶ *U.S. v. Reynolds*, *supra* note 32 at 9-10.

³⁷ Not reported. See 35 Labor Cases ¶ 71, 713; 27 U.S. L. Week 2065. See also *Mitchell v. Tomlin*, 252 F. 2d 513 (8th Cir. 1958).

and (3) the identity of persons whom the plaintiff knows or believes has any knowledge concerning the alleged violations.

The Secretary responded to item 3 by giving a list of 85 employees and former employees of the defendants and elected not to respond to items 1 and 2. The Secretary's defense was that it was contrary to public policy to reveal the names of informants from whom information might have been obtained in the course of an investigation. The court limited the obligation of plaintiff with respect to item 1 only to require that defendants be informed as to the identity of the 85 employees and former employees who had furnished written statements to plaintiff. With respect to item 2, the court ordered that plaintiff should indicate which of the above mentioned written statements were taken by persons other than attorneys of record in the proceedings, since it had been intimated at the hearing that some of the statements might have been taken by attorneys of record.³⁸

Plaintiff also filed a claim of privilege pursuant to REV. STAT. § 161 on the ground that the court's order would be prejudicial to the Government and to the public interest. Accompanying affidavits stated that 18 employees of the defendants had been interviewed and that on direct instructions from the Secretary of Labor each person interviewed had been assured that his identity and the fact that he had given information, as well as the information given, would be kept confidential and would not be revealed, except to authorized government agents. The plaintiff also argued that if disclosure were required it would make other employees of other business enterprises reluctant to disclose information to plaintiff's investigators concerning other violations of the Fair Labor Standards Act. Defendants countered with a motion to dismiss the action pursuant to Rule 37(b) (2) (iii) of the Federal Rules of Civil Procedure.³⁹

After finding that the claim of privilege was not warranted the court entered an order of conditional dismissal, i.e., directed that defendants' motion would be denied should the plaintiff comply on or before August 25, 1958; otherwise the dismissal would take effect.⁴⁰

In the opinion the court concluded that the ultimate determination as to whether the claim of privilege shall stand rests with the court, and found that the identity of persons who had given written statements would be necessary to the preparation of a defense. The court pointed out that the question of whether the defendants would be entitled to the statements was before it at this time. On the claim of privilege based on the promise of confidence the court said that: "Government investigators cannot, unless permitted by law, give blanket guarantees of nondisclosure to the people they interview."⁴¹

³⁸ Obviously this limitation in the court's order resulted from consideration of the "work product of the lawyer" doctrine: *Hickman v. Taylor*, 329 U.S. 495 (1947). This argument was raised by the SEC in the *Timbers* case, *supra* note 17, but no mention of it was made by the Court of Appeals in its opinion.

³⁹ The rule provides that if a party fails to produce documents requested pursuant to FED. R. CIV. P. 34, the court may dismiss the action, stay proceedings, strike pleadings or parts thereof, or render a default judgment against the disobedient party.

⁴⁰ The author is informed that the Secretary of Labor elected not to furnish the information, and has filed an appeal.

⁴¹ The informer's privilege is defined in discussion in *Rovario v. U.S.*, 353 U.S. 53, 59 (1957). The court said:

"What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of

The court was not impressed with the argument made by plaintiff that a requirement to disclose the names of informants will result in a large scale refusal by persons to give information concerning violations for fear of retaliation by employers.⁴²

The use of the discovery rules by parties to actions brought by the Government, is apt to result in a considerable number of problems to the enforcement agencies. This will be especially true if a volume of cases develops in which privilege is asserted and claimed.

C. Criminal Cases

In this field, as well as in the cases in the civil field where the Government is a party, the courts have been prone to permit entry into the government's door, despite a claim of privilege. However, the criminal field stands apart. There are considerations in this area which do not obtain in civil cases.

An important opinion is *United States v. Andolschek*.⁴³ In that case twenty-two employees of the Alcohol Tax Unit of the Treasury Department were indicted. Three of those found guilty had sought to obtain at the trial certain reports which they had filed following investigations they had made, hoping that the reports would support their contention that they were not guilty. The

statements of law to officers charged with enforcement of that law. *Scher v. United States*, 359 U.S. 251, 254; *In re Quarles and Butler*, 158 U.S. 532; *Vogel v. Gruaz*, 110 U.S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

"The scope of the privilege is limited by its underlying purpose. Thus, where the disclosure of the contents of a communication will not tend to reveal the identity of an informer, the contents are not privileged. Likewise, once the identity of the informer has been disclosed to those who would have cause to resent the communication, the privilege is no longer applicable.

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informer's identity or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations the trial court may require disclosure and, if the Government withholds the information, dismiss the action . . ."

The court then summarized its statement by indicating the problem would have to be solved case by case (*Id.* at 62):

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure unconstitutional must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."

"It seems to the writer somewhat naive, and certainly it closes the eyes to expectable human, emotional reactions, in effect to hold that an employer's possible retaliation for information against him will not have an effect upon persons asked to give information. The thrust of this and like decisions has not yet filtered down to the mass of the people. It would seem that the argument to the contrary must rest upon the assumption that one does not have anything to fear from giving testimony about a person who is guilty of violating the law. However, this argument assumes what has to be proved. It does not always follow that the federal enforcement agency will prove its case, convict the wrongdoer and punish him. Doubtless in some cases, the civil remedy sought or the criminal conviction desired, will not be obtained. Then there is no wrongdoer; on the contrary the defendant is in the position to sue that he has been wrongfully and improperly charged. Woe to the employee who has participated in this so-called miscarriage of justice.

It is not our purpose to become involved in an extended discussion of the merits of the *Andolschek* case, *supra* note 37. It is summarized in detail because it is an excellent example of problems which may arise in enforcement litigation.

⁴² 142 F.2d 503 (2d Cir. 1944).

trial judge excluded the reports because he thought their disclosure was forbidden by Department regulations. On this point Judge Learned Hand said:⁴⁶

"... While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversy between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open, and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully...."

The most recent cases which have affected the question of disclosure are *Rovario v. United States*⁴⁵ and *Jencks v. United States*.⁴⁶

The *Rovario* case⁴⁷ was a prosecution for possessing and transporting narcotics. The defendant sought the name of a paid government informer prior to the trial and on several occasions during the trial. The Government refused to disclose the name so as not to prejudice other pending cases. In reversing the refusal of the trial judge to make this information available to the defendant the Supreme Court held that the defendant was entitled to the name of the informer. The court also indicated that defendant should have gotten the information prior to the trial.⁴⁸ In explaining its holding the court mentioned, among other things, that the informer's possible testimony was "highly relevant", that the informer was defendant's one material witness, and that there might have been an entrapment in this case.⁴⁹ However, these contentions are criticized in a dissenting opinion by Mr. Justice Clark from which it would appear that defendant may have known the identity of the informer.⁵⁰

A recent case which presents an interesting result in the light of the *Rovario* case is *Amaya v. United States*,⁵¹ wherein the defendants were prosecuted for forceably assaulting, resisting, opposing, impeding, intimidating and interfering with an immigration officer in the performance of his duties. The officer had received information that certain aliens who were in the United States illegally were in the habit of frequenting a certain bar near his home. On the evening in question the informer told the officer that one of the aliens was in the bar. The officer went to the bar and, after showing his credentials to per-

⁴⁶ *Id.* at 506.

⁴⁵ 353 U.S. 53 (1957).

⁴⁶ 353 U.S. 657 (1957).

⁴⁷ *Rovario v. United States*, *supra* note 45.

⁴⁸ *Id.* at 65, n. 15.

⁴⁹ The Government's case was proved by the testimony of a man who was secreted in the trunk of the car in which defendant and the informer were riding. And, also, by the testimony of another witness who followed in another car. One of the witnesses testified that when defendant was arrested and the informer was brought to the police headquarters the informer said he did not know the defendant.

⁵⁰ There is an indication in the report that the informer had died: see dissenting opinion and comments therein: *Id.* at 66, *et seq.*, and particularly at 69, 70.

⁵¹ 247 F. 2d 947 (4th Cir. 1957) *cert. denied*, 355 U.S. 916 (1958).

son in the bar, proceeded to question them. Upon noticing that one person appeared to be making an exit, the officer stopped him to ask him questions. Immediately thereafter the officer was assaulted and beaten by the two defendants, one of whom filed this appeal. Rather than discussing privilege, the opinion discusses the basic problem from the point of view of whether or not there was prejudicial error for the trial court to preclude appellant's counsel from inquiring into the identity of the informer. After citing certain portions of the *Rovario* opinion the court stated:⁵²

"In the instant case the immigration investigator had the right to enter a bar, which was open to the public, to interrogate 'any alien or person believed to be an alien as to his right to be or to remain in the United States.' The problem here 'is one that calls for' safeguarding 'the public interest in protecting the flow of information.' On the other hand, since the officer had the right to enter the saloon in the first place, knowledge of the identity of the informer would in no way have aided the appellant in exercising his 'right to prepare his defense.' It merely would have subjected the informant to the danger of a physical attack perhaps comparable in brutality to the one visited upon the immigration officer while in discharge of his duty."

An extension of the *Amaya* case beyond its particular facts would go a long way towards restoring the informer's privilege. If the *Amaya* principle is applied generally so that, where a government agent obtains information in the performance of a statutory function, he need not disclose whether an informer gave him any leads with respect thereto, much ground would be retrieved.

The *Amaya* case is not the only one in which a Court of Appeals has restricted the holding of the *Rovario* case.⁵³

In the famous *Jencks* case⁵⁴ the Supreme Court held that where crucial testimony was given against the defendant by two paid undercover agents for the FBI, who stated on cross-examination that they had given regular oral and written reports to the FBI concerning matters to which they had testified, that the reports should be made available. Interestingly enough, the defendant asked that the reports be shown to the trial judge. However, the majority went beyond this point⁵⁵ and made the reports available to the defendant. The majority held that petitioner was not required to lay a preliminary foundation for his motion, showing inconsistency between the contents of the reports and the witnesses' testimony and that the petitioner was entitled to inspect the reports to decide whether or not to use them in his defense.

⁵² *Id.* at 952.

⁵³ Following the *Rovario* case limitations have been placed upon its application: (1) the defendant must make demand for disclosure of the identity of a "special employee" of the government and his failure to do so at or before the trial is a waiver of the right to the information: *United States v. Colletti*, 245 F. 2d 781 (2d Cir. 1957); *United States v. Walker*, 350 F. 2d 519 (7th Cir. 1957); (2) where a federal agent is performing a function authorized by statute, here interrogation of persons in a public place, the fact that he may have received a tip to interrogate persons at that place, or even a particular person, does not require disclosure of the identity of the informant: *Amaya v. United States*, 247 F. 2d 947 (9th Cir. 1957); (3) where the identity of the so-called informer is known: *United States v. Gernie*, 252 F. 2d 664 (1st Cir. 1957) *certiorari denied* 78 S. Ct. 1006.

⁵⁴ 353 U.S. 657 (1957).

⁵⁵ See concurring opinion by Mr. Justice Burton. *Id.* at 672, and particularly at 675 to 677.

Following this decision, the problems created by the misinterpretation of it, including the dismissal of several criminal prosecutions, resulted in the Congress taking action and passing the so-called *Jencks statute*.⁶⁶ The principal effect of the statute is to buttress the privilege against disclosure of government enforcement files. The statute provides that (1) the production of statements and reports shall be limited to situations where a government witness has testified; (2) on request the court may examine such statements "in camera" and excise irrelevant portions thereof, with the proviso that if a defendant objects then the statement will be preserved for consideration on appeal and the trial will continue; (3) upon an election by the Government not to make a statement available the court may either (a) strike the testimony of the witness, or (b) declare a mistrial; and (4) the term "statement" of a witness is limited to either (a) a written statement made and signed by the witness or otherwise adopted or approved by him, or (b) a substantially verbatim recital of an oral statement to a government agent which has been recorded contemporaneously (stenographically, mechanically or electrically) with the making of the oral statement.

Through this enactment relating to "any criminal prosecution brought by the United States," the Congress has lessened immeasurably the risk to the Government of withholding a statement in a criminal case. It would appear to follow *a fortiori* that the penalty should be no greater in a civil case. Although the *Jencks statute* only protects against dismissal of a case for failure to produce a statement where a witness has testified, it appears that the underlying Congressional intent is to protect and safeguard the government prosecution. The same principle is just as applicable in support of the claims of privilege against disclosure of information, particularly in civil cases wherein the Government is a party.

For the time being at least, the *Jencks statute* has taken much pressure off federal enforcement agencies in criminal cases.⁶⁷

D. Administrative Proceedings

It was not long after the *Jencks* case that the question as to the production of witnesses' statements in quasi-judicial proceeding before an administrative board was raised in *Communist Party of the United States of America v. Subversive Activities Control Board*.⁶⁸

Although that portion of the opinion dealing with the production of reports and statements and the application of the *Jencks* case is not wholly clear, it appears that the case holds with respect to the production of material for impeachment purposes as follows: (1) the production of statements and reports

⁶⁶ 71 Stat. 595 (1957) 16 U.S.C. § 3500 (Supp. V. 1957). On the procedures set out in the statute see: *United States v. Rosenberg*, 257 F. 2d 760 (3d Cir. 1958), cert. granted December 9, 1958.

⁶⁷ Doubtless it will not be long before the *Jencks statute* is tested on constitutional grounds. It will be interesting to see whether the public policy announced by the Congress will stand in the face of contentions that the statute precludes the proper preparation of a defense and amounts to a fundamental lack of due process. See *Scales v. U.S.*, 260 F.2d 21, 40-44 (4th Cir. 1958).

After this article was sent to the printers, the Supreme Court granted certiorari in three cases in which questions of interpretation of the *Jencks statute* are involved: *U.S. v. Rosenberg*, note 56 *supra*; *U.S. v. Palermo*, 258 F. 2d 397 (2d Cir. 1958); *U.S. v. Lev, et al*, 258 F. 2d 9 (2d Cir. 1958).

⁶⁸ 254 F. 2d 314 (D.C. Cir. 1958).

required only after the witness has testified; (2) the report or statement of the witness must have been made or adopted by the witness himself—notes of interviews made by third persons are not subject to production;⁶⁹ and (3) good cause must be shown by the person demanding the documents.⁶⁰

It has been suggested the *Jencks* case is not applicable to administrative agency quasi-judicial proceedings on the question of the production of statements. In fact, shortly following the *Jencks* case the National Labor Relations Board so held; however, in another case its view was not sustained on appeal.⁶¹ It may well be that the courts will tend to apply the principle of the *Jencks statute* to administrative quasi-judicial proceedings. If so it would not seem to present any great difficulty. Consequently, an early application of the *Jencks statute* in agency proceedings might well avoid the reopening and retrial of cases which would otherwise be reversed because ordinarily the production of statements in such cases would be refused.

RECLASSIFICATION OF NON-PUBLIC INFORMATION

Doubtless employees of federal agencies have relied innumerable times upon department or agency rule to tell an inquiring member of the public that the information requested cannot be divulged. On such an occasion the member of the public is being told, in effect, that certain things are available to the public and others are not. Just what is available to the public will vary among the agencies. In some agencies practically all correspondence is placed in a non-public file. In others, much correspondence appears in public files. For example, the Chairman of the Civil Aeronautics Board testified on October 17, 1957, before the Special Subcommittee on Legislative Oversight⁶² that in a particular case being considered by the Board a letter from one member of Congress might appear in a public file, whereas a letter from another member of Congress relating to the same case might be put into a non-public file. The difference in filing these letters could result solely from the manner in which the respective communications were addressed, i.e., whether to the Board or a particular member. Contrariwise, two letters from different Congressmen addressed to the Securities and Exchange Commission or one of its members would at least receive equal treatment. Both letters would be filed non-public.

The unanimous passage by Congress of the amendment to REV. STAT. § 161 serves resounding notice on departments and agencies that something should and

⁶⁹ In ruling that "written accounts" of an interview "made by a third party" were not required to be produced because they were hearsay, the court referred to the new *Jencks statute*, supra note 56, which makes it plain that notes of an interview, etc., are not statements within the meaning of that statute. In this context, the court stated that: "Surely the executive files of the Government are not to be invaded more easily and with less basis in a regulatory administrative proceeding of this sort than they would be in a criminal prosecution." *Id.* at 325. Thus, it appears that the court would not apply a broader rule to an administrative proceeding than that presently applicable to criminal cases under the statute.

⁶⁰ *Id.* at 321. In discussing the issue dealing with the production of statements, although the court did not define "good cause" specifically, it indicated that there must be a reasonable showing beyond mere hope or expectation that the particular document demanded would be helpful in determining the ultimate credibility of the witness.

⁶¹ The Great Atlantic and Pacific Tea Co. and Independent Bakery Workers Union (1-CA-17) and The Great Atlantic and Pacific Tea Co. and Arlene C. Smith (1-CA-2284), 118 N.L.R.B. No. 138, September 3, 1957. But see: *National Labor Relations Board v. Adhesive Products Corp.*, 258 F. 2d 403 (2d Cir. 1958).

⁶² This testimony has not been printed to date.

must be done to make as much information as possible available to the public. The first step in this direction would be the establishment of uniformity of classification between public and non-public information. It is not unreasonable for members of the public or of the press to expect to be able to obtain the same types of information at all departments and agencies.

Procedures leading to uniformity can be either voluntary or involuntary. Before the Congress feels that it must take action to induce such uniformity by pressure or legislative fiat, it would be well for responsible agency officials to consider working out uniform procedures on a voluntary basis. The fewer the distinctions in classification of materials in agency files the less the likelihood of complaint; also, the more uniformity there is the greater the conformity with the spirit of the amendment to REV. STAT. § 161. Should such a project be undertaken it would seem that in classifying doubtful types of material the amendment calls for resolution of the doubt in favor of classifying the matter as public.

Should government-wide uniform classification ultimately be accomplished, and should doubtful matters be resolved in favor of the public's right to know, much of the current Congressional complaint should subside. Of course, enforcement agencies would still be confronted with problems of disclosure as to matters deemed to be privileged. And, where disclosure of a privileged document is a question in litigation, careful consideration should be given henceforth to whether or not the claim of privilege shall be made. There are many examples of cases where absolutely nothing is to be gained by claiming a privilege. Merely to refuse to produce a requested document just because there is a rule is to be discouraged. A rule is not a reason. All such questions, on principle, require consideration by department or agency heads. Pro forma refusal to produce upon demand is to be avoided.

ASSERTING THE CLAIM OF PRIVILEGE

There are situations in which no purpose is served by a claim of privilege. To assert the claim can result only in unfortunate precedents and "bad law." Some examples of such situations include (1) employment records such as leave, pay, vacation records, etc., in a case in which the Government is not a party,⁶³ (2) information previously made public in another proceeding⁶⁴ and (3) matters traditionally within the scope of cross-examination.⁶⁵

Just as obviously there are matters which never should be disclosed. They may not be so glamorous as military secrets, as in the *Reynolds* case,⁶⁶ or matters relating to foreign affairs and the national defense, but they are important to the proper functioning of a department or agency. One such matter is the recommendations made by staff personnel to department or agency heads. Another is the deliberations of agency members, not only in quasi-judicial matters,

⁶³ *Morris v. Atchison, Topeka and Santa Fe Railway Co.*, 21 F.R.D. 155 (W.D. Mo. 1957).

⁶⁴ The sum paid by the Government to an informer had been previously disclosed in other litigation but was refused in *Communist Party of the United States of America v. Subversive Activities Control Board*, *supra* note 58, at 329-30. *Quaere*, what purpose could possibly have been served.

⁶⁵ It is well established that an expert's fee is a proper inquiry on cross-examination. *Ibid.* Other such types of well-established areas open for cross-examination should not be the subject of claims of privilege.

⁶⁶ *Supra* note 32.

but in administrative matters as well. Both of these were involved in the *Timbers* case⁶⁷ and were held to be secure from disclosure.

In a case where a claim of privilege is to be asserted the better practice is to lodge the claim as soon as the issue is raised. It should be a formal claim by the department head or the agency and it should be in writing. Care must be taken to raise the issue squarely as a question of privilege and that word must be used. It is not sufficient to urge that a document is "confidential." There is a clear distinction between the treatment given things "confidential" as compared with "privileged" matters.⁶⁸

In addition to the claim of privilege there doubtless will be questions relating to the necessity for or the relevancy and materiality of the requested information or document. Following the filing of the formal claim of privilege counsel should exhaust every argument with respect to necessity or relevancy and materiality.

If the immediate problem concerns necessity, suggestions may be made of alternatives to disclosure of the privileged matter. This was discussed in the *Reynolds* case.⁶⁹ There the Air Force offered, in lieu of the reports, to permit the three surviving members of the airplane crew to testify. The court said that necessity was greatly minimized by this available alternative. Although the court did not approach the problem from the standpoint of relevancy, that question was in the case. There was no suggestion of a causal connection between the accident and the secret equipment being used. Depending upon the facts of each particular case, it is probable that alternatives may be suggested which many times will obviate the need for a head-on clash on the question of privilege. The same result is possible by raising questions of relevancy and materiality. The *Overby* case⁷⁰ is an excellent example of this. There, the court itself proceeded to narrow the problems involved. In this way, also, a head-on clash as to privilege may be avoided. The more cases decided on the collateral questions and the narrower the question of privilege is—then the greater the likelihood of preserving privileged information.

⁶⁷ *Supra* note 17.

⁶⁸ In *Communist Party of the United States of America v. Subversive Activities Control Board*, *supra* note 58, at 321, the court stated:

"The first point here concerns the status of the documents involved; they are official possessions of the FBI. The Government repeatedly urges that they are confidential. Only in its brief here, and only in one sentence, does it claim they are privileged. There is a vast difference between confidential and privileged. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of such character that the law as a matter of public policy protects them against disclosure. A communication from a person to his banker may be confidential, but it is not privileged; certain of his communications to his doctor or his lawyer are not only confidential but also privileged; the law does not permit their disclosure even under subpoena by a court. So, too, with Government documents . . .

"The Government did not claim before the Board in the present proceeding that the documents here involved are privileged. No factual allegations as to privilege have been made. We cannot consider an unsupported claim made only in the brief here that the doctrines of privilege apply. That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon every demand; good cause for intrusion into confidential files and materiality and relevancy must be shown. The law in that area is well settled." (Emphasis supplied).

⁶⁹ 345 U.S. at 10-11.

⁷⁰ 224 F.2d 158 (5th Cir. 1955).

The *Overby* case⁷¹ is also important on the question of waiver of privilege. Although in that case the reports in question had been made available to one of the parties (the bank) to the litigation, the court said the Government was still entitled to raise the question of privilege with respect to the other party (the surety). Only the Government can waive the privilege.⁷²

In conclusion mention should be made of some of the arguments which were made in the *Timbers* case⁷³ in support of non-disclosure and which were not mentioned by the court in the opinion. They were:

1. The doctrine of *Hickman v. Taylor*⁷⁴ that the "work product" of an attorney need not be disclosed under the discovery provisions of the Federal Rules of Civil Procedure. Although there is no specific mention of the *Hickman* case,⁷⁵ obviously it was an underlying factor in the *Roma* case.⁷⁶
2. Separation of powers: In the *Timbers* case⁷⁷ it was argued that Securities and Exchange Commission files were confidential and that the files of an independent agency in the executive branch were free from encroachment by other branches of the government. The legislative branch takes a dim view of this theory;⁷⁸ the recent cases indicate that the judicial branch does also.⁷⁹
3. In an investigation the Securities and Exchange Commission's function is similar to that of the grand jury and its files should be accorded the same type of immunity.⁸⁰ The *Jencks* case⁸¹ has been interpreted to preclude this argument, as to the testimony of a witness before the grand jury.⁸²
4. The attorney-client privilege: The argument was made that the Commission, just as a private client, is entitled to the safeguards of this time-honored privilege with respect to legal questions on which it obtains advice from its own counsel.

CONCLUSION

In litigation in which the Government is a party, as well as in private litigation, counsel for parties may be expected to continue their efforts to pry into Government's files. Many times what they seek will be unnecessary. Other times the matters sought will be irrelevant or immaterial. Such "fishing" must be contested for what it is on those bases. In fewer cases the Government's privilege will be squarely in issue. The courts' problem will be to balance the equities between the public interest in enforcement cases and the rights of the individual. There is no "short answer."

⁷¹ *Ibid.*

⁷² *Id.* at 163.

⁷³ *Supra* note 17.

⁷⁴ *Supra* note 38.

⁷⁵ *Ibid.*

⁷⁶ See discussion, *supra* pp. 20-22.

⁷⁷ *Supra* note 17.

⁷⁸ See discussion, *supra* p. 14.

⁷⁹ See cases cited in footnotes 32, 37, 43, 45 and 46; and cf. 57.

⁸⁰ The SEC brief cited: *In re Securities and Exchange Commission*, 84 F. 2d 316, 318 (2d Cir. 1936), *rev'd for mootness*, 299 U.S. 504 (1936); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 216 (1947).

⁸¹ *Supra* note 46.

⁸² *United States v. Rosenberg*, 245 F. 2d 870 (3d Cir. 1957).

EXECUTIVE PRIVILEGE—A PROBLEM FOR PRESS AND BAR: A JOURNALIST'S VIEW

CLARK MOLLENHOFF *

INTRODUCTION

Four years ago a precedent was established which I believe constitutes one of the greatest threats to freedom of the press in the United States in our time. It creates a situation in which regulatory agencies and other decision-making agencies would be exposed to secret tampering. This precedent should be of equal concern to responsible members of the bar.

I speak of the May 17, 1954 letter written by the President to the Defense Secretary. It was written during the Army-McCarthy hearings to prevent testimony as to conversations between officials of the Army, the Department of Justice and a member of the White House Staff.

The original letter was only a broad statement of the rights of the Executive Branch of the Government to keep certain things "confidential" and out of the scope of congressional inquiry. It was the breadth of the statement on confidential records that made the precedent dangerous. The application of that letter since then demonstrates clearly that there is reason for grave concern by the press and the bar.

EXECUTIVE PRIVILEGE

Various officials of the Executive Branch have stretched this claim of "executive privilege" far beyond anything that could have been conceived in the reading of the original letter. Instead of correcting these officials, the Executive Branch has backed them fully. This support has continued in the face of reports by a half dozen congressional committees which state there is no law and no court decision to back this extreme secrecy doctrine.

The Bureau of the Budget refused to allow certain witnesses to be questioned and certain papers produced in connection with the handling of the Dixon-Yates contract. It declared that under the May 17, 1954 letter, Congress was entitled to the decisions of the agency, but could not go behind those decisions since papers and conversations involved in formulating policy were "confidential."

Normally, the ability of the press to penetrate executive agencies is pretty much contingent on the power of congressional committees to penetrate these agencies. The power of lawyers to penetrate the governmental maze on behalf of their clients is as often contingent upon the power of Congress. I've heard of a few hardy journalists who feel they can pry loose sufficient information without any aid from Congress. However, I think that most realists will admit that their own effectiveness in getting information of an unfavorable character is pretty closely tied to the power of Congress to move in and document the case.

The Bureau of the Budget letter interpreting the May 17, 1954 letter set down this principle: The executive departments can regard as confidential all

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of the conversations and papers leading up to a final decision. Only the final decision is subject to the subpoenas of Congress, but if Congress can't get the information leading up to a decision, the reporters and lawyers can't get it. That precedent stands today as the greatest potential barrier to every reporter who starts an inquiry into the actions or spending of an executive agency.

"Executive privilege" stands as a convenient umbrella under which any executive agency head can take cover when questioned by congressional committees or reporters. Fortunately most agency heads have too great an appreciation of their public responsibility to use this precedent. However, enough have used it to make it completely clear how great is the potential danger. Dozens of times, witnesses before congressional committees have commented: "We consider that information to be confidential under the President's May 17, 1954 letter."

A former administrator of consular affairs for the State Department told a Senate investigating subcommittee that he could not and would not relate his discussions with an executive assistant in the Agriculture Department because it was "confidential executive business." He cited the May 17, 1954 letter in this barrier to a probe of the handling of the Ladejinsky security case.

Practically every investigation of the Executive Branch in the past four years has been confronted with this claim of "executive privilege." It was used in inquiries which were made into shipment of strategic materials to Iron Curtain countries; the Al Sarena timber transactions; the activities of certain telephone company executives at the Justice Department; the Business Advisory Committee activities at the Commerce Department, and a variety of investigations at the Agriculture Department.

The Agriculture Department even tried to claim "executive privilege" to withhold copies of a booklet that were burned because they were regarded as inconsistent with Department policies. The Department gave up the "executive privilege" claim only after it became apparent the house investigating subcommittee already had all the information it needed to make things hot for the Department.

Investigations of the Moss Subcommittee, and reports of various congressional committees stated that there was no support in law or in court decisions for this claim. Decisions of the U.S. Supreme Court were cited and the claims of the Justice Department were shredded. It was pointed out that the Congress must have the right to investigate how laws are being enforced and administered, or Congress will have lost its right to legislate. The Executive Branch was asked for one law or one Supreme Court case that would support this claim of executive privilege. No cases were produced to support this claim.

"INHERENT RIGHT"

The Executive Branch only asserted that there was some "inherent right" not set out in law or in court decisions which gave the Executive Branch the right to hide the record. This was a right that was the right of the President, but in the May 17, 1954 letter, it was argued that this right had been given to each of the department heads. The various department heads and their subordinates are free to arbitrarily decide what will be given to Congress and what will be withheld.

Then, in March 1958, the Department of Justice took this "executive privilege" one step further. It was stated before the Hennings Subcommittee of the Senate Judiciary Committee that even the so-called "independent regulatory agencies" had the right to use "executive privilege" to refuse records and testimony to committees of Congress. This meant that officials of the S.E.C., C.A.B., I.C.C., F.T.C., F.C.C., and F.P.C. had Justice department backing and authority to refuse to testify on communications with the White House and with others inside the agency or in other agencies of government.

From the time the Harris Subcommittee on Legislative Oversight (formerly the Moulder Subcommittee) had started its work in 1957, it had run into this claim of "executive privilege" from the various regulatory agencies. Efforts to determine the White House communications with these agencies ran into a brick wall of defiance, and a claim that contacts from the White House staff were "confidential executive communications" and outside the realm of what might be obtained by committees of Congress.

In a few short years, the precedent of the presidential letter has shifted the burden of justification for access to Government records. Under this precedent, the Government need not prove that information is "confidential." The Congress, the lawyer and the newspaper reporter are put in the position where they must demonstrate why information should not be treated as "confidential."

These are not cases where national security is involved or is claimed as a reason for withholding information. These are not cases where the information sought is in a raw investigation file or is part of a personnel or loyal-security file. These are not cases that involve the diplomatic relations of the U.S. and another country. This problem centers around secrecy in agencies that are handling domestic policy, and the rights of litigants to a fair open hearing. It involves the right of the public and the press to examine the workings of agencies of government.

PROBLEM NOT POLITICAL

It is not necessary to generalize and say one administration is better or worse than any other. My own experience indicates that the agencies normally try to do a good job of getting out information—until they have something to hide.

The fact that there may be better information policies today in some Government agencies makes the precedent of "executive privilege" no less a threat to the press and our processes of government. As long as the precedent remains unchanged, the press or the public can be barred at any time on the whim of the agency head. Congress can also be blocked.

I do not believe that the President's letter was any devious act planned to strike at the press. On the contrary, I am sure it was innocently and hurriedly devised to meet an intra-party political problem presented in the Army-McCarthy hearings. However, the fact that the blow was not aimed at freedom of information is unimportant if it puts the press and the power of Congress within the range of danger.

It is not necessary for newspapers or bar groups to take sides on the various squabbles between the executive agencies and congressional committees that happen to be operated by chairmen of a different political complexion. We should consistently take the position that Congress is entitled to the maximum

information unless clear reasons are shown why public policy dictates the information should not be available.

I would not propose to allow Congress to interfere with the operation of the Government by the Executive Branch of the Government. However, when the executive decision has been made, the Congress and the press should be entitled to know what factors went into the decision. If we are barred from going behind decisions, the door is opened for the fixers.

This problem of "executive privilege" should not be approached as a political problem in which a given administration is the villain. The letter happened to have been written in the present administration, and it so happened that some officials have used it in a manner which precluded inquiry.

I have no doubt that future administrations, irrespective of party, will use it in the same way if this precedent is not changed. We must face the fact that it is not safe for us to allow any policy to stand under which the agency heads can intone "confidential" and not even make the pretext that security or other specific problems of national interest are involved. We must also accept the fact that public officials will always be tempted to hide their "mistakes," their "imprudence," or their improprieties from view of the public.

Those who established this Government realized that freedom of the press is essential to a working democracy. They realized that open hearings are essential to fair play and public information of judicial or quasi-judicial bodies. Writers since Alexis DeToqueville have commented on the fact that democracy is dependent on an informed public—and an informed public is dependent on open hearings and a free press. Whether we like it or not, freedom of the press is dependent upon the ability of Congress to pry loose the details.

Any President of the United States should see clearly why the open record policy is to his advantage. Unless they are open, a President is at the mercy of those he appoints to head the agencies and those on his staff. Regardless of the care used in making appointments, there is always the possibility of an agency head going wrong. A President does not normally conduct an independent investigation of the reports filed by various agencies. They depend on the men who report to them. For over fifty years Presidents have often received their first inkling of nonfeasance, misfeasance or malfeasance in office from a news story or a question at a press conference.

Periodically, responsible officials have stated that the May 17, 1954 letter should not be used to cover up improper acts by officials of the Executive Branch. A President would not knowingly allow "executive privilege" to be used to cover up improper acts. But, is that enough? What about future Presidents? It is possible that future leaders in the Executive Branch could use this precedent to throttle the press, totally frustrate congressional investigations, and arbitrarily control decisions of all the so-called "independent" regulatory agencies. This possibility should be enough to galvanize all newspaper groups and all bar associations into action now.

THE LAWYER'S STAKE

Secrecy in government is as much a problem for the lawyers as it for the nation's newspaper editors and reporters. Secrecy creates the atmosphere in

which unauthorized representation, innocent or not, can operate. This is true whether the secrecy is a result of the use of "executive privilege" or the distortion of the so-called "housekeeping statute" or the Administrative Procedure Act. It is equally true when the secrecy is the result of misapplication of the security rules and regulations.

The "executive privilege" claim is the most devastating only because it is embracing, and can be used and abused. It is time that the American Bar Association and other bar groups start giving this problem the kind of attention it deserves. Lawyers and legal groups should be in the front line fighting for open government at every turn instead of sitting quietly in their chairs until the newspapers of the country or the committees of Congress put the spotlight on the problem.

Secret Government decisions could adversely affect a client's interest in a government contract, and cause a result which would have been different if the facts had been discussed openly. Television awards could be influenced by communications from the Executive Branch or the Congress. The latter could not, however, assert executive privilege if an injury is made.

Secret determinations on loyalty and security cases bar clients from receiving findings on the charges which caused them to be dismissed from their jobs. Secret health reports filed in the department of Health, Education and Welfare may result in your client being fired without being able to find the reason. And, in these cases the HEW even has barred the client's doctor and lawyer from learning the cause of dismissal.

Months of hearings on an international airline route may take place before the Civil Aeronautics Board, and your client may find a decision influenced by factors which do not appear in the record. Similar conditions could arise if your client sought action against an unethical competitor before the Federal Trade Commission, or a company which is not complying with the regulations of the Securities and Exchange Commission.

This Government was intended to be a government of laws, and not a government of men. But, off-the-record decisions are becoming more prevalent as the Federal Government becomes larger and more complex.

Secret government tends to be a government of men. There is no need to comply with the standards of a strict yardstick if the decision can be made secretly. Strict adherence to law and precedent fails when decisions can be made behind closed doors and without an accounting. It is obvious that members of the bar should not participate in such proceedings, or cause them to take place.

Reputable lawyers don't want off-the-record decisions to determine the multi-million-dollar decisions or, for that matter, the small decisions of the Government. Such decisions could be tolerated no more in our Federal regulatory agencies than they are in our Federal Courts.

It is understandable why attorneys practicing before a specific agency might not want to lead a battle to open up records and correct procedures that top Government officials oppose. Lawyers don't like to infuriate those Government officials who may be ruling on their clients' rights.

However, this is the reason why legal groups as a whole should tackle these problems in all agencies and not leave it to the specialized bar group that happens to be dealing with the agency. The legal specialist can be helpful in pointing out the problems that exist at the Federal Communications Commission, the Interstate Commerce Commission, the Federal Power Commission or the other regulatory agencies. But it is only normal that they would be cautious about stepping on toes.

This is why the full force of the various legal groups of the country should be brought against rules, regulations, laws or practices that impose secrecy or allow broad secrecy on government records and decisions.

There should be no question but that a code of ethics should be established in agencies that do not have such a code, and the codes in existence in other agencies should be reviewed.

If agencies are as reluctant as the FCC has been on this subject, the code should be established by the Congress and the bar associations should be requesting it if the Congress does not move quickly.

The Code of Ethics should provide for the same ethical standards as the Canon of Ethics of the American Bar Association, and it should not be warped by any provisions for keeping secret part of the record.

HOUSEKEEPING STATUTE

On August 12, 1958, President Eisenhower signed a law amending the so-called "housekeeping statute," to provide that this 1789 law can no longer be used as grounds for withholding information from the Congress, the press or the public.

The law was originally passed to make heads of various government departments responsible for the care and custody of records. It was distorted into authority to make regulations to prohibit use of the records.

The simple amendment states: "This section does not authorize the withholding of information from the public or limiting the availability of records to the public."

That sentence should make it clear to any government official that he cannot use this statute any longer as authority for secrecy.

The cooperation between the bar association groups and various newspaper groups made it possible to get this simple amendment passed by the Congress and signed into law by President Eisenhower. The feat was accomplished in the face of the most stubborn opposition from the Executive Branch.

EXECUTIVE BRANCH POSITION REGARDLESS OF PARTY

The position taken by the Executive Branch is not a Republican position or a Democratic position. It is simply the position that is usually taken by the party in power following its natural desire to make decisions for the benefit of the party in power.

Newspaper associations and bar associations will always find themselves aligned against "the party in power" in seeking open government, and administrative decisions under procedures that are as nearly similar to the Federal

Courts as is practical. Those in office are not necessarily bent upon a path of favoritism, blunders or inefficiency when they insist that secret records and secret decisions are best. They are often doing what seems to them to be the best thing in providing quiet secret sessions for weighty decisions.

For this reason, the newspapers and the bar associations should be equipped with the cases and the arguments to show that secret government is bad for government officials.

The undesirability of off-the-record communications has been dramatically brought to public attention before the Legislative Oversight Subcommittee. They demonstrate that secrecy is bad for all parties to the communication and it is bad for the lawyers caught in the flow of events.

COMMUNICATIONS WITH REGULATORY AGENCIES

It is time that there is an absolute prohibition against Executive Branch or Congressional communications with regulatory agencies except those made openly—in writing, and with the correspondence available for inspection in a public file. This is a step toward a government of laws, and not of men. This is freedom of information for the press, and for any other members of the public with an interest. To the lawyer, it is the opportunity to find out the facts before the agency and the chance of a fair decision.

Lawyers may find that from time to time they must argue for secret government to shield the private financial transactions of a client when the records were submitted to an agency in confidence. Lawyers may find, also, that to serve a client best they must argue that a personnel file or a security file must be kept secret.

But, during this argument, lawyers should keep in mind that the secrecy that protects a client today may destroy him tomorrow. The case of a Mrs. A. who came to my office has dramatized this point for me, and I'm sure many newspaper men and lawyers have run into the same problem.

Mrs. A. is a woman of about 50, and she had years of service with the Civil Service Commission as a shorthand reporter. She had some problems with an employee in the same section, and some disagreement with a supervisor. She was asked to go to the Department of Health, Education and Welfare for a physical examination.

Mrs. A. took the physical examination, and shortly afterwards was forced to resign. She was given no reason, except that something in the physical examination made her unqualified to continue as a government employee. Mrs. A. went to a private physician, and had a thorough examination to try to find out why she was unqualified to hold her job with the government. The doctor could find no reason why she should be discharged.

At this point, Mrs. A. hired a lawyer. Neither the doctor nor the lawyer could obtain access to the records of the physical examination given to Mrs. A. at the Department of Health, Education and Welfare.

The lawyer hired by Mrs. A. found himself tilting with a ghost. He couldn't even find out why his client was discharged, and yet was faced with trying to establish proof that whatever was alleged was not true.

This reporter was informed at the Health, Education and Welfare Department that the physical records of all government employees are confidential. I pointed out that this confidential status was undoubtedly set up for the purpose of protecting the government employee against public intrusion, but that it certainly couldn't be meant to keep a government employee or her private doctor from examining the record. Officials at the Department of Health, Education and Welfare disagreed.

In this same way, the secrecy surrounding the loyalty security files is often perverted to the detriment of the government employee. The original logic for the secrecy on these files was based on protection of the government employee. However, it has been perverted to protect the government administrators who may act arbitrarily on a discharge.

AMENDMENT TO LAWS

The Moss Subcommittee of the House Government Operations Committee is giving some real leadership to the fight against government secrecy. The Senate Judiciary Subcommittee on Constitutional Rights, headed by Senator Thomas Hennings (Dem., Mo.) is in the forefront in fighting secrecy on the other side of the Capitol. The Newspaper Publishers Association, the Sigma Delta Chi Journalism fraternity, and the Associated Press Managing Editors have all supported the basic goals of the Moss Subcommittee.

The House Government Operations Committee has recommended this basic policy in attacking government secrecy:

"Congress should establish a uniform and universal rule on information practices. This rule should authorize and require full disclosure of information, except for specific exceptions defined by statute or restricted delegation of authority to withhold for an assigned reason within the scope of the authority delegated."

The amendment to the housekeeping statute is the first step in carrying out that policy, and the newspapers and legal groups saw eye to eye on it.

The next target should be amendment of the Administrative Procedure Act to remove the authority for imposing secrecy on non-security matters. Bills have already been drawn by Moss and Hennings to achieve this goal.

This is not as simple and easy a matter to explain as the one sentence amendment to the housekeeping statute. But, it is short enough for full study and understanding.

The Administrative Procedures Act was passed in 1946. The purpose of the act was to prevent the imposition of bureaucratic secrecy on the fast-growing administrative actions of the federal government. But, in that law were provisions that information might be kept secret "in the public interest," or "for good cause found," or because it relates to "internal management" of an agency.

Federal officials in the past decade have had a field day with those three phrases. They have twisted those phrases into excuses to defeat the right of the press, the Congress and the public to get information on government operations when no possible security problem could be involved.

The proposed amendment to the Administrative Procedure Act would insert the paragraphs set forth below¹ in the "public information" section.

John Mitchell, chairman of the public information subcommittee of the American Bar Association Administrative Law committee, has pointed out that the proposed Moss and Hennings amendments to the Administrative Procedure Act "do not differ significantly from the proposed revisions of that Section contained in the ABA's proposed Code of Administrative Procedures."

Lawyers who have tussled with the problems of Federal regulatory agencies, or the other administrative decisions, should be quick to see why these public information amendments are of importance to their clients.

With the housekeeping amendment out of the way, the deck is cleared for action in pushing these amendments to the Administrative Procedures Act through at the next session of Congress.

The other big basic problem in the fight against secrecy is the broad claim of "executive privilege." When President Eisenhower signed the bill amending the housekeeping statute, his comment made it clear that the administration is standing firm on its claim that the Executive Branch has an all inclusive and

¹"A. Every agency shall separately state and promptly file for publication in the Federal Register and the Code of Federal Regulations:

- (1) descriptions of its central and field organization, including delegations by the agency of final authority;
- (2) statements of the general course and methods by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available;
- (3) descriptions of all forms for public use and instructions related thereto including a statement of where and how such forms and instructions may be obtained; and
- (4) every reorganization, amendment, or revision of the foregoing.

B. Every agency shall separately state and promptly file for publication in the Federal Register and in the Code of Federal Regulations:

- (1) all procedural rules;
- (2) rules relating to the availability of information to the public;
- (3) all statements of general policy or interpretation formulated and adopted;
- (4) all other rules; and
- (5) every amendment, revision, or repeal of the foregoing.

C. Every agency shall promptly file its orders and opinions, or make them available to the public in accordance with rules published in the Federal Register and the Code of Federal Regulations stating where and how they may be obtained, copied, or examined. No order or opinion shall be valid or effective until it has been published or made available for public inspection.

D. Every agency shall promptly make available to the public . . . all records, files, papers and documents submitted to and received by the agency. Public records include but are not limited to, all applications, petitions, pleadings, requests, claims, communications, reports, or other papers and all records and actions by the agency thereon, except as the agency by published rules finds that withholding is required by (the exception) subsection. Every individual vote and official act of an agency shall be entered of record and made available to the public.

E. No rule, order, opinion, or public record shall be relied upon or cited by an agency against any person unless it has been duly published or made available to the public in accordance with this section. No person shall in any manner be required to resort to any organization or procedure not so published.

F. The provisions of this section shall not require disclosure of subject matter which is:

- (1) specifically exempt from disclosure under statute,
- (2) required to be kept secret in the protection of the national security, or
- (3) of such a nature that disclosure would be a clearly unwarranted invasion of personal privacy; however, nothing in this section authorizes withholding of information or limiting availability of records to the public except as specifically stated in this subsection."

inherent power to withhold any information from the Congress, the public or the press by merely asserting that it is "confidential executive business."

The President said:

"In its consideration of this (the housekeeping statute amendment) legislation the Congress has recognized that the decision-making and investigative processes must be protected. It is also clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an executive department to keep appropriate information or papers confidential in the public interest. This power in the executive branch is inherent under the constitution."

The statement made it clear that the Department of Justice will continue to press its extreme position on this point. Many authorities assert that the position taken by the Department of Justice has no support in law.

Sharp and comprehensive attacks on the position taken by the Department of Justice have flowed from legal authorities and from newspaper and congressional sources. Those attacks are certain to continue. They will be renewed every time officials of the administration try to assert this untenable claim of broad "executive privilege" to hide records or refuse to testify.

Bar association groups should be as active as the press and the Congress in assailing this extreme doctrine of secrecy which the Department of Justice has espoused. Government lawyers should not lend themselves to support of such a sorry and distorted theory that is totally inconsistent with the need for an informed public—the heart of democracy.

The legal profession, through the various bar groups, is constantly deploring the fact that lawyers as a group are not regarded more favorably by the public. This should be a matter of major concern to all members of the legal profession.

A legal profession that really wants to boost its public relations stock should strike hard and often at government secrecy. The bar should be a loud voice in favor of keeping the activities of our Government out where they can be examined. Lawyers should be the first to see and to appreciate fully what bureaucratic secrecy can do to our system of government. They shouldn't be afraid, too polite, or too political to shout about it.

CONCLUDING REMARKS

In conclusion, it would be appropriate to quote from one of the most lucid and decisive analyses written on this subject. It was written by Dr. Harold L. Cross for the August issue of the *Bulletin* of the American Society of Newspaper Editors, and was reprinted in the *Congressional Record* on August 20, 1958 (page A7448).

"The executive branch as of now has no such specially privileged right of privacy as against the people, their Congress or their courts. The claim to one harks back to royal prerogative and is made in a land, where there is reason to believe, the people have done something more than merely to change their kings. If such a privilege ought to exist, let it be sought forthrightly by amendment of the Constitution or in legislation by the Congress inasmuch as 'The founders of this Nation entrusted the law-

making powers to Congress alone in both good and bad times. It would do no good to recall the historical events, the fears of power and the hopes of freedom that lay behind their choice. Any such privilege should depend by law on the nature and circumstances of the record, paper, or information involved and not upon the status (as being in the executive branch or exercising executive functions) or the will or the discretion or the caprice of the official happening to have custody. No such servant of the people should be judge in his own cause."

THE PUBLIC'S RIGHT TO KNOW AND THE PUBLIC INTEREST—A DILEMMA REVISITED

CONRAD D. PHILOS *

Few subjects present a dilemma as perplexing as the one analyzed in this symposium. This proposition is illustrated by the fact that debates on the subject are as heated, the arguments as intangible, and the results as indecisive in the missile age as they were in the ball and musket era.

This article will attempt only to bring into focus those issues relating primarily to requests for information from the public. Accordingly, an attempt will not be made to discuss the principles governing requests from the Judicial or Legislative Branches, but the need of these agencies for information will be compared to that of the public, so that the subject of the public's right to know can be viewed in the proper perspective.

Until recently, very little material was available on the subject of the public's "right to know." However, the advent of the "cold war," the missile age, and a phenomenal growth in our economy gave rise to many novel governmental problems, and created many intricate relationships within Government and between the Government and its citizens. Against this background, the Hennings and Moss Subcommittees were created to inquire into a facet of these developments which is the subject of this article. These committees prepared a number of preliminary analyses, studies and reports on the subject. This material was supplemented by the testimony of a number of witnesses who presented various viewpoints.¹

The foregoing records, and the law review articles and books² which are beginning to appear on the subject, provide a wealth of information and thought.

* Consultant to the Judge Advocate General of the Army. For biographical sketch, see p. vi.

¹ Subcommittee on Government Information of the House Committee on Government Operations, 84th and 85th Congresses (Moss Subcommittee); Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary, 85th Congress (Hennings Subcommittee). The former committee published the following material: *Printed Hearings*: Part 1, Panel Discussion with Editors et al. (Nov. 7, 1955); Part 2, Civil Serv. Comm., Post Office, Treasury and Agriculture (Nov. 8, 9, and 10, 1955); Part 3, Panel, Legal Experts (May 8, 9, 1956); Part 4, Panel, Scientific and Tech. Info. (March 7, 8, 9, 1956); Part 5, Dept. of Defense, 1st Sect. (July 9, 10, 12, 1956); Part 7, Dept. of Defense 2nd Sect. (Nov. 13-15, 1956); Part 8, Dept. of Defense, 3rd Sect. (March 11, 12, 1957); Part 9, Dept. of Defense, 4th Sect. (April 10, 11, 12, 1957); Part 10, Dept. of Defense, 5th Sect.—Army, Navy, Air Force Info. Chiefs (July 1, 8, 1957); Part 11, Proposed Amendment of "Housekeeping Statute" Rev. Stat. 161 (5 USC § 22) (July 22, 1957); Part 12, Panel Discussion, Government Lawyers (June 20, 22, 1956); Part 13, Dept. of Defense, 6th Sect. (Nov. 18, 19, 1957); Part 14, 2nd Hearing on Amendment of "Housekeeping Statute" *supra*, (Feb. 6, 7, 1958); Part 15, Restrictions on Flow of Scientific and Technological Info., (Jan. 21, 22, 1958).

Subcommittee Reports: H. R. REP. No. 2947—Availability of Info. from Fed. Depts. and Agencies—25th Intermediate Rept., (July 27, 1956); House Rept. 157, Availability of Info. from Fed. Depts. and Agencies, Progress of Study (July-Dec. 1956)—2nd Rept. Feb. 22, 1957; House Rept. 1461—Amending Sect. 161 of REV. STAT. with respect to authority of Fed. Officers and Agencies to Withhold Info. and Limit Availability of Records (March 6, 1958); H. R. REP. No. 1619—Availability of Info. from Fed. Depts. and Agencies (Scientific Info. and Natl. Defense)—23rd Rept. April 22, 1958; H. R. REP. No. 1884—Availability of Info. from Fed. Depts. and Agencies (Dept. of Defense)—27th Rept.—June 16, 1958; House Rept. 2578—Availability of Info. from Fed. Depts. and Agencies (Progress of Study, Feb. 1957-July 1958)—35th Rept. Aug. 13, 1958.

² E.g., Mitchell, *Government Secrecy in Theory and Practice*; "Rules and Regulations" as an Autonomous Screen, 58 COLUM. L. REV. 199 (1958), written by the Moss Subcommittee's able counsel. See also CROSS, *THE PEOPLE'S RIGHT TO KNOW* (1953).

provoking discussions. When this material is evaluated in the light of the subject of this article, the following issues are presented:

1. Can the Executive Branch withhold *non-defense* information from the public? It is to be noted that this statement of the problem *excludes* three areas of discussion:

- (a) Requests for classified defense information;³
- (b) Principles applicable to regulatory agencies;⁴
- (c) The *authority* of the Executive Branch to withhold information from Congress instead of the public. However, the *effect* of a withholding from Congress vis-a-vis the public will be discussed.

2. The second proposition is the effect of the amendment of Section 161 of the *Revised Statutes* (1875), 5 USC § 22 (1952). This statute provides:

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers and property appertaining to it."

The amendment provides:

"This section does not authorize withholding information from the public or limiting the availability of records to the public."

The proponents of this Bill (H.R. 2767)⁵ took the position, in substance, that the Executive Branch had issued directives which imposed certain limitations upon the release of information to the public, and that these directives were erroneously based upon the provisions of this statute.⁶

The Hennings Subcommittee on Constitutional Rights held hearings on a companion Bill in the Senate (S. 921). The Subcommittee filed a favorable report, and late in the session the Senate passed an amendment which contained the same language as the House Bill. On 12 August 1958 it was enacted into law by the signature of the President.⁷

Unfortunately, many questions remained unanswered even after the bill was passed. This result is due in large part to a number of misconceptions concerning the basic statute. It can be understood only if it is placed in its proper relationship to the Constitution, other statutes, and finally, to the administrative procedures which implement its provisions. It is imperative that this

³ All parties were in general accord that bona-fide military and atomic secrets could be withheld from the public. However, there was substantial disagreement in defining the outer limits of a military secret, and the time when it no longer qualified for protection.

⁴ This subject is discussed elsewhere in the symposium.

⁵ Representative Hoffman, the minority member of the Subcommittee, unsuccessfully introduced a second amendment in turn, H.R. 2810. It would have acted as a corollary to H.R. 2767, and it provided that the basic statute neither authorized the *withholding* of information, nor did it require the *releasing* of any information which would have an adverse impact upon the public interest.

⁶ Mitchell, *supra* note 2, at 207.

⁷ The President also issued the following statement: "It is clear from the legislative history of the bill that it is not intended to, and indeed could not, alter the existing power of the head of an executive department to keep appropriate information or papers confidential in the public interest. This power in the executive branch is inherent under the Constitution." *Washington Post & Times Herald*, Aug. 13, 1958, p. A2.

relationship be clarified if there is to be any understanding of the effect of the amendment upon the operations and prerogatives of the Executive Branch.

If the statute is placed in its proper perspective, a better insight will also be secured into the concept of the public's "right to know." Accordingly, the pertinent principles will be developed in the following order:

1. The public's "right to know" under the Constitution.
2. Application of the "right to know" concept.
3. The scope and function of Section 161 of the *Revised Statutes* (1875) before the amendment.

I. THE PUBLIC'S "RIGHT TO KNOW" UNDER THE CONSTITUTION

In a discussion of this subject, the Constitution invariably becomes the frame of reference, and sometimes the Constitution is cited to support divergent positions. Unfortunately, the references are mostly of a general nature, and the point is frequently made that the framers of the Constitution did not envisage limitations upon the public's right to know. It might be well, therefore, to revert to the Constitution to see if the intent of its framers can be divined, and if they intended to recognize any limitations upon the public's right to information. A detailed analysis of the background of the Constitution cannot, of course, be attempted in this article. However, there are several historical facts which will be noted.

The Articles of Confederation of 1781 contained the following provision:

"Article IX. The congress of the United States * * * shall publish the Journal of their proceedings monthly, *except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy*; and the delegates of a state, or any of them, as his or their request shall be furnished with a transcript of the said Journal, except such parts as are above excepted, to lay before the legislatures of the several states." (Emphasis added).

It is most significant that the framers of the Articles provided that only the underscored types of material could be withheld. Thereafter, at the Constitutional Convention, the question arose as to whether the same language, or broader language, should be used, and the following debate was recorded:

"In Convention—Mr. MADISON and Mr. RUTLEDGE moved, that each House shall keep a Journal of its proceedings, and shall publish the same from time to time; except such part of the proceedings of the Senate, when acting not in its legislative capacity, as may be judged by that House to require secrecy."

"Mr. MERCER. This implies that other powers than legislative will be given to the Senate which he hoped would not be given.

"Mr. MADISON and Mr. RUTLEDGE's motion was disagreed to by all the states except Virginia.

"Mr. GERRY and Mr. SHERMAN moved to insert, after the words 'publish them,' the following, 'except such as relate to treaties and military

* 19 THE JOURNALS OF THE CONTINENTAL CONGRESS 214 (Library of Congress ed. 1912), cited in MASON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA xxxvii, xliii (1920).

operations.' Their object was to give each House a discretion in such cases. On this question,—

"Massachusetts, Connecticut, ay, 2; New Hampshire, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, no, 8.

"Mr. ELLSWORTH. As the clause is objectionable in so many shapes, it may as well be struck out altogether. The legislature will not fail to publish their proceedings from time to time. The people will call for it, if it should be improperly omitted.

"Mr. WILSON thought the expunging of the clause would be very improper. The people have a right to know what their agents are doing or have done, and it should not be in the option of the legislature to conceal their proceedings. Besides, as this is a clause in the existing Confederation, the not retaining it would furnish the adversaries of the reform with a pretext by which weak and suspicious minds may be easily misled.

"Mr. MASON thought it would give a just alarm to the people, to make a conclave of their legislature.

"Mr. SHERMAN thought the legislature might be trusted in this case, if in any.

"On the question on the first part of the section, down to 'publish them,' inclusive,—it was agreed to, *nem. con.*

"On the question on the words to follow, to wit, 'except which parts thereof as may in their judgment require secrecy,'—

"Massachusetts, Connecticut, New Jersey, Virginia, North Carolina, Georgia, ay, 6; Pennsylvania, Delaware, Maryland, South Carolina, no, 4; New Hampshire, divided." *

The pertinent considerations were certainly before the Convention, but the above provision—with its broad grant of discretion—was adopted. Two conclusions of great significance can be drawn from the debates on this question:

1. The framers of the Constitution recognized an implicit need—in appropriate cases—for secrecy in the conduct of the public's business.
2. The framers did not adopt the provision of the Articles of Confederation which would limit protection to only military operations, treaties and alliances. Accordingly, these limitations did not appear in the final draft of the Constitution.¹⁰

Moreover, it cannot be said that the action of the Conventions represented unintentional or precipitate decisions, for it is an historical fact that the delegates applied the same criterion to their own convention meetings and held them in closed session. Can it be said that the nation's interests suffered because only the final document was released? What would have been the answer if the news media of the day had contended that the public had a right to know—not only the contents of the final draft—but also of the preliminary drafts, the discussions, the exchanges of opinion, and the divided votes of the delegates? Apparently,

* 5 ELLIOTT, DEBATES ON THE FEDERAL CONSTITUTION 408, 409 (1787).

¹⁰ U. S. CONST. art I, § 5, cl. 3, now states: Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy; and the Yeas and Nays of the Members of either House on any question shall, at the Desire of one fifth of those Present, be entered on the Journal. . . .

James Madison was convinced that all of the preliminary material should be withheld until it could be viewed in the proper perspective. Accordingly, the first provision for its release was made in his will, and the following extract is pertinent:

"Considering the peculiarity and magnitude of the occasion which produced the convention at Philadelphia in 1787, the Characters who composed it, the Constitution which resulted from their deliberation, its effects during a trial of so many years on the prosperity of the people living under it; and the interest it has inspired among the friends of free Government, it is not an unreasonable inference that a careful and extended report of the proceedings and discussions of that body, *which were with closed doors*, by a member who was constant in his attendance, will be particularly gratifying to the people of the United States, and to all who take an interest in the progress of political science and the cause of true liberty." (Emphasis added.)¹¹

Several delegates outlined cogent and persuasive reasons for not making the journal of the Convention public. The following extracts reflect their views:

"FRANKLIN rose with a speech in his hand, which he had reduced to writing for his own convenience, and which Mr. WILSON read in the words following:—

"... Thus, I consent, sir, to this Constitution, because I expect no better, and because I am not sure that it is not the best. The opinions I have had of its errors I sacrifice to the public good. I have never whispered a syllable of them abroad. Within these walls they were born, and here they shall die. If every one of us, in returning to our constituents, were to report the objections he had had to it, and endeavor to gain partisans in support of them, we might prevent its being generally received, and thereby lose all the salutary effects and great advantages resulting naturally in our favor among foreign nations, as well as among ourselves, from our real or apparent unanimity. . . ."

* * * * *

"Mr. KING suggested that the Journals of the Convention should be either destroyed, or deposited in the custody of the president. He thought, if suffered to be made public, a bad use would be made of them by those who would wish to prevent the adoption of the Constitution.

"Mr. WILSON preferred the second expedient. He had at one time liked the first best; but as false suggestions may be propagated, it should not be made impossible to contradict them.

"A question was then put on depositing the Journals, and other papers of the Convention, in the hands of the president; on which,—

"New Hampshire, Massachusetts, Connecticut, New Jersey, Pennsylvania, Delaware, Virginia, North Carolina, South Carolina, Georgia, ay 10; Maryland, no, 1.

"The president, having asked what the Convention meant should be done with the Journals, &c., whether copies were to be allowed to the members, if applied for, it was resolved, *nem. con.*, 'that he retain the Jour-

¹¹ Extract from the will of James Madison, 19 April 1835, cited in 9 HUNT, preface to WRITINGS OF JAMES MADISON 549 (1910).

nal and other papers, subject to the order of Congress, if ever formed under the Constitution.'" ¹²

Are any of these same considerations applicable to the matters—of varying types and degrees of importance—which are considered today by Congress or by the Executive Branch? It is apparent that the release of the discussions on many of these internal matters, either at the time they took place or in the foreseeable future, would have the gravest implications. Moreover, this result would obtain even though national defense information is not involved. One illustration is the now famous Gaither Report which contained intensive and revealing studies on our defense posture. Many requests from news media were directed to the President for the release of the Report. He refused. Mr. McCloy, former U.S. High Commissioner in Germany, and now board chairman of the Chase Manhattan Bank, was one of the contributors to the Report. He defended the refusal, and said:

"President Eisenhower needs to feel free at any time to call on anyone to work on such reports and it would only serve to dampen the enthusiasm and willingness of those called on if they knew the results would be made public."

He added:

"There are in that report some indices the contents of which I would hate to see be made public." ¹³

II. APPLICATION OF THE RIGHT TO KNOW CRITERION

A. Information Practices of Congress

It is readily apparent that the basic considerations which influenced the delegates to the Constitutional Convention to withhold information have equal validity today, for present day Congressional Committees frequently exercise the right to safeguard information in executive sessions. Moreover, these sessions cover many subjects which are not related to the national defense, treaties or alliances. In a recent study conducted by *The Congressional Quarterly*, it was reported that the committees listed such things as national security, government efficiency and preserving the private rights of witnesses as reasons for closing meetings.

Consequently, we find that Congressmen, like the Convention delegates, recognized the need to protect information which did not relate to military or state secrets. *The Congressional Quarterly* analysis also disclosed that in the period 1953 to 1957, the number of closed committee hearings ranged from 41% to 34%.¹⁴ It can be fairly concluded, therefore, that Congress does not make a

¹² 5 ELLIOTT, *op. cit. supra* note 9, at 554, 558. Certain portions of the Journal were cited by Mr. Robert Dechert, General Counsel, Department of Defense, before the Moss Subcommittee. *Hearings Before a Subcommittee of the House Committee on Government Operations*, 85th Cong., 1st Sess., at 2180, 2211 (1957).

¹³ Associated Press Report, January 20, 1958, of a speech at the annual Elizabeth Blackwell award ceremonies in New York. The report also contained defense information which had to be protected.

¹⁴ "Congressional committees in 1957 held fewer of their meetings behind closed doors than in any year since 1953, on a percentage basis. Senate committee sessions dropped from 37% closed in 1956 to 34% in 1957. ***

full disclosure to the public. This result can be hypothesized in only one manner, and that is on the basis that Congress recognizes that it must have more detailed facts than the public requires. In fact, it is obvious that not only the public, but many members and committees of Congress who do not participate in the closed sessions, are barred from certain types of information.

Is it undemocratic for Congress to withhold information from the public? Not at all. Congress could certainly urge that such a practice is an inescapable product of representative government. Unless we are to return to direct participation in law-making by the citizens—as in the case of ancient Greece—a legislative committee must have a *greater* need for *more* facts than the members of the general public. An illustration, of course, would be the need of the Foreign Relations Committee for the facts concerning negotiations with a "cold war" ally. (The Supreme Court specifically recognized the President's authority to exclude even Congress from the negotiations in the case of *United States v. Curtiss-Wright Export Corp.* 299 US 304, 319 (1936).) If more information is released under an indiscriminating stewardship, the public interest could suffer. If less is released, the remedy does not lie in significant modifications in the committee system (any more than it would require significant modifications in the corresponding executive procedures).¹⁵ Rather, it appears that the remedy would lie in the correction of errors in judgment, if errors they be, in making individual decisions to withhold information.

In any event, we are forced at this phase of the discussion of the public's right to know, to inquire if the Executive Branch is vested with less discretion than is the Congress in safeguarding information. Certainly it would be strange to argue that the founding fathers desired only to protect information which was developed during the legislative process and did not intend to extend this protection to the executive process. In this connection it should be noted that the First Amendment to the Constitution, which is frequently mentioned in support of the public's right to know, is *expressly* directed at acts of Congress.

"Nine standing committees that met 10 or more times held 50% or more of their meetings with the public barred. These committees and their percentage of closed meetings: House Ways and Means, 88; Senate Rules and Administration, 69; House Foreign Affairs, 67; Joint Atomic Energy, 63; Senate Foreign Relations, 61; House Public Works, 58; Senate Armed Services, 56; House Administration, 55; House Judiciary, 53.

"Eleven major committees held less than 25 percent of their meetings in closed session: Senate Special Committee on Improper Activities in the Labor or Management Fields, 3; Senate Select Small Business, 10; House Select Small Business, and House Interior and Insular Affairs, 14 each; House Education and Labor, 16; House Veterans' Affairs, 18; House Armed Services, 20; Senate Judiciary, 23; House Agriculture, House Government Operations, and Senate Interior and Insular Affairs, 24 each." 13 CONGRESSIONAL QUARTERLY 93 (1957).

The same publication reported that Congress closed one third of its committee meetings during the first three months of 1958. *Id.* at vol. 16, p. 473. (It must be conceded that certain of the meetings had to be closed because the committee was considering information which was classified by the Executive Branch).

¹⁵ In connection with the subject of the release of staff papers (see note 34 *infra*) it is to be noted that the Legislative Branch also imposes appropriate limitations on the release of staff papers. The office procedures of the Archives require that a requesting party establish a legitimate interest before staff working papers of given Congressional Committees can be released to it. (E.g., "Restrictions Statement" for specified files of Senate Committees).

Similarly, see Senate Standing Rules 35 and 36 and the discussion of the precedents and practices under these rules in Senate Procedures (1958) by Watkins and Riddick (Senate Parliamentarians) at pp. 128, 317-23.

In many instances the information which is withheld by the Executive Branch from the public is made available to the elected representatives of the public in Congress.

B. Precedents under Parliamentary System

At the beginning of this article, it was stated that the question of release of information to Congress would not be covered. It is necessary, however, to discuss one general aspect of the problem in order to illustrate that the public cannot have a greater right to know than does the legislature.

It is often implied that the limitations placed upon the release of information by our Government are phenomena which are peculiar to our system of government.¹⁶ However, a number of Western democracies observe the same principles and this is true even in countries in which the *executive branch is directed by members of Parliament*. For example, in England, the cabinet officials withhold information concerning executive operations from their Parliamentary colleagues if they believe this action is necessary in the public interest.¹⁷

A particularly intriguing illustration of this practice occurred when former Prime Minister Anthon Eden steadfastly refused to divulge to the House of Commons any details about the mysterious death of the British "frogman," Commander Crabbe. He met his death while swimming in the vicinity of a sinking Soviet cruiser which brought former Premier Bulganin and Nikita Khrushchev to Britain.¹⁸

In a learned comparison of the procedures in the United States and France, the writer emphasized the fact that it was an established practice to circumscribe requests by the Parliament for executive records (or the testimony of witnesses). In fact, he concluded that it was often necessary for the Parliament to invoke *ministerial responsibility* in order to secure the records. He describes one historical encounter in the following words:

"The Minister of Finance most urgently recommended that no inquiry be started which would gather evidence from public officials and documents for the purpose of cutting down on spending not essential for the war. In this case the government was overruled. But one of the Deputies of the vanquished minority cried out in indignation, 'You have reestablished the Convention.' To such an extent did it seem revolutionary to subject the Government to a closer than usual scrutiny." (Emphasis added.)²⁰

¹⁶ In discussing *Kaiser Aluminum & Chemical Corp. v. United States* in footnote 33, the related question is asked whether the general public has a greater right to know than do the Courts.

¹⁷ This was apparently President Tyler's understanding of the English system when he denied a Congressional request for the recommendations of Col. Hitchcock which concerned the Cherokee Indians. HIND'S, PRECEDENTS OF THE HOUSE OF REPRESENTATIVES 182 (1907).

¹⁸ The following colloquy took place:

"It would not be in the public interest to discuss Commander Crabbe's disappearance," Mr. Anthony Eden said in reply to a question in the House of Commons. ***

"Laborite John Dugdale, who had asked the question of the Prime Minister, posed another after Sir Anthony had finished: 'Is the Prime Minister aware that this is one of the most extraordinary statements ever made by a Prime Minister?'"

"Sir Anthony refused to elaborate. 'I thought it right I should make this statement to the House and I have nothing to add to it.'" (He had earlier stated that the mission did not have official sanction.) (Associated Press, London, May 9, 1956.)

¹⁹ A corresponding control exists in the United States, if the Executive Branch abuses discretion.

²⁰ Ehrmann, *The Duty of Disclosure in Parliamentary Investigation: A Comparative Study*, 4 U. CHI. L. REV. 138, n. 250 (1944), citing J. O. Debates, Ch. 3665 (1916).

He concluded that the practice of withholding information from the Congress of the United States is less prevalent. "What in the French Republic seems to have been the rule is certainly the exception in the United States."

The subject was equally controversial in Germany, and in one period requests of this nature accompanied a complete breakdown in parliamentary inquiry. The Government took the position that the requests of the Parliament for official files or the testimony of civil servants violated the principle of separation of powers.²¹ As in France, it was often necessary for the Parliament to resort to the expedient of "ministerial responsibility" in order to secure information. Despite this ultimate weapon, a wide field was left untouched by Parliamentary investigation in republican Germany, and certain matters, "such as all questions pertaining to foreign policy or military life, were simply taboo."²² All in all, the German Republic achieved greater penetration by Parliamentary investigations than did France, but this was due to the accident of greater party discipline rather than to the strength of the Parliamentary position.

This excursion has taken us afield from our subject of release of information to the public, but it was done so that these releases could be measured against requests by foreign Parliaments. For it seems self-evident that the public, or its news media, would not have had a greater right or a more facile means for securing the information from the Executive Departments of the English, French or German Governments in the situations which were discussed.

C. Application of Right to Know Concept of the Executive Branch

1. The Types of Information which are Safeguarded from the Public

It is obvious that the entire problem can be viewed in the wrong perspective if it is assumed that the Executive Branch safeguards all, or even a significant amount of information.²³ That is not the case, for voluminous amounts of timely and important material are continuously being released.²⁴ Even with this understanding, it is self-evident that productive discussions cannot be undertaken until the concept of the "public's right to know" is clarified even further.²⁵ We have seen how it was applied by Congress in its releases to the public. An attempt will now be made to analyze some of the practices and procedures of the Executive Branch. This analysis is not made upon the basis that two wrongs make a right. Rather it is made in the belief that sound and logical considerations justify the procedures of both Branches.

²¹ *Id.* at 140-41.

²² *Id.* at 142. The arguments of our own Executive Branch were presented on 6 March 1958 to the Hennings Subcommittee by the Attorney General in a memorandum entitled "The Power of the President to Withhold Information from the Congress," (published in Committee Print, 85th Congress, 2nd Session.)

²³ The arguments in favor of a broad right to know by the public are set forth at length in the Subcommittee hearings. The point of view is ably summarized by Mr. Harold L. Cross in his testimony on 4 February 1958. Compare these arguments to those on page 81 of "Freedom or Secrecy," New York, Oxford University Press (1956) by J. R. Wiggins, which discuss the validity of certain limitations upon the public's right to know.

²⁴ For an outline of the vast amount of information released, see speech by Attorney General William Rogers (then Deputy), *The Right to Know Government Business from the Viewpoint of the Government Official*, 40 MARQ. L. REV. 83 (1956).

²⁵ From time to time, the advocates of a broad right to know have recognized certain exceptions in the case of national defense and foreign relations. For example, see the article of Mr. Wiggins elsewhere in this symposium.

At the outset, it will be noted that the public's right to know is normally related to purely governmental operations as distinguished from those which primarily affect individual interests. This distinction is difficult to articulate. However, if a distinction is not made, it is virtually impossible to postulate meaningful rules or principles to govern the release of information to the public from files of the Executive Branch. In an earlier article which was published during the Army-McCarthy hearings,²⁶ the author attempted a journey through the then uncharted waters, and he classified records into three categories:

a. Records which are safeguarded in order to protect interests of Government.

In this category are placed records such as confidential reports of investigations conducted by Inspectors General; communications received from confidential informers; national defense information; reports and opinions rendered on a confidential basis by officials to their seniors; attorney-client communications between Government lawyers and officials; and plans for the procurement or disposition of supplies and installations. Information of this type is safeguarded in order to insure the integrity and the success of Government operations.

It is not coincidence that the issue was sharply joined on the question of the release of Inspector General reports in two Congressional hearings, namely: the Army-McCarthy hearings in May 1954, and a Moss Subcommittee hearing in November 1958. In fact, the dispute was inevitable, for these reports are jealously guarded. When the Secretary of the Air Force recently denied the request of the Comptroller General for a copy of a report prepared by the Inspector General of the Air Force on the subject of the progress of that service's guided missile program, the Moss Subcommittee conducted hearings on the matter. The President justified the denial on the basis that recommendations in these reports have been "a most useful advisory tool" in running military departments and that historically, recommendations and advisory material in such reports have not been released.²⁷

It is equally apparent, however, that reports of this nature contain detailed information which pertains to critical management or personnel problems. Accordingly, they are earnestly sought by agencies and individuals outside the Executive Branch and therein "lies the rub." In some cases, summaries of the pertinent facts can be released to persons with a legitimate interest. This action was taken in the case of the Air Force report, and it is to be noted that this approach does not require the release of opinions, comments or conclusions of the investigating officer, or information which would compromise the identity of confidential informers.

It is self-evident that the time element may be a vital factor to be considered in determining the public's right to know the contents of many of the other records, for even if it were conceded that the public had a right to know an

²⁶ *Executive Privilege and the Release of Military Records*, 14 FED. B. J. 113 (1954). The hearings of the Hennings and Moss Subcommittees have now provided a wealth of material which should make possible more analytical and comprehensive articles in this profoundly important area.

²⁷ This language was contained in a letter written by the President to Rep. Hoffman, the minority member of the Subcommittee, reported in the Washington (D.C.) *Evening Star*, November 14, 1958. Chairman Moss threatened to offer an amendment to the next Air Force money bill to force the release of the report (N.Y. *Times*, November 14, 1958). In connection with this proposal, see discussion of ministerial responsibility in footnote 19.

ultimate decision, it would not follow that the public had a right to a premature release. For example, if the Government plans to procure certain supplies of material, a premature release of the plans could result in disruptive economic effects or favorable treatment for a few.

b. *Records which are protected to protect the interests of individuals.*

In this second category are placed unsubstantiated allegations of misconduct against individuals, information relating to the financial condition or "know-how" processes of Government contractors; and medical records of military and civilian personnel and their dependents. Information of this type is safeguarded for the obvious purpose of protecting the interests of the individuals concerned. It should be noted that only a relatively few types of information in this category are protected by a clear-cut statute. (For example, see 18 USC § 1905, which prohibits the disclosure of financial condition or know-how of Government contractors.)

There are countless other types of information, and it is self-evident that it would be impracticable to protect each of them by statute. It is to be noted, however, that a statute could not act as a bar to a citizen's request if he had a constitutional right or some equally inherent claim to all government records.

c. *Records which are safeguarded because they contain elements of both of the foregoing categories*

The principles applicable to these records are the same. However, the processing of requests may be complicated by the fact that mixed interests are present.

2. *Application of the Principle of the Public's "Right to Know."*

Once a distinction has been made between various categories of records, and on a pragmatic basis, the problem is clarified considerably, for it immediately becomes apparent that the public has neither an equal right nor an equal interest in matters which affect some Government operations or in many incidents which concern the lives or affairs of individual employees of firms. In view of the diverse considerations which affect these different classes of records, each will be discussed separately.

a. *Public Records*

At the very outset, it is readily conceded that the public has a right to receive "public information" about the affairs of its Government. A responsible official would not knowingly attempt to withhold "public information," that is the information which is in, or is qualified to be in, the public domain.

b. *Contents of a Public Record.*

What is normally found in a public record which is in the public domain? We find one or more of the *facts* relating to the particular event or operation, a statement of the *policy* which is applied, or the *decision* of the official who is authorized to take final action in the matter. Records which are limited to these types of information qualify for release. However, in practice, the composition of the record is not always so simple. Additional items which contain other types of material frequently are included. In some cases unformed or overzealous officials misapply basic rules. When any of these factors are present, information might be withheld improperly. However, it is obvious that this result is due to an error in application, and not to an error of concept.

c. *Contents of Non-Public Records.*

The contents of many records are also released even though the documents are not public records. These records represent the conglomerate mountains of miscellaneous information which find their way into the Government's files.²⁸ Certain other records, however, are not released because they contain defense information,²⁹ or official non-defense information which must be protected in the public interest. (For purposes of convenience, this latter category will be referred to hereafter as "official information.") It is the category involving official information which generates the most controversy. The three major types of information which fall into this category were outlined earlier: (1) records which protect operations of Government; protect individual or private interests; or which protect mixed interests.)³⁰

(1) *Internal Communications*

Probably the most interesting type of internal communications is the one which involves advisory opinions, certain confidential reports to senior officials, and discussions between officials. The most famous and oft-cited reference in this type of communication is the President Eisenhower letter to Secretary Wilson.³¹ However, the concept expressed therein is neither new nor limited to its use to a given administration. President Truman espoused a similar principle in connection with Congressional requests for the identities and decisions of board members who participated in security cases.³²

The non-partisan nature of the doctrine of executive privilege is demonstrated further by a recent decision of the Court of Claims in the *Kaiser Aluminum* case.³³ There, the Court said:

"Executive privilege is a phase of release from requirements common to private citizens or organizations. It is granted by custom or statute for the benefit of the public, not of executives who may happen to then hold office. . . .

"While this is not the attorney client privilege the demand for this document seeks to lay bare the discussion and methods of reasoning of public officials. The fact that the author is dead is immaterial here. It is not a privilege to protect the official but one to protect free discussion of pros-

²⁸ The only limitation is that the requests not be burdensome and that the requesting party pay the statutory fee for copies.

²⁹ This article does not discuss the legal basis or the reasons for protecting defense information. The necessity for this action (if information qualifies for protection) is seldom challenged.

³⁰ Criteria for identifying items of information in this category are set forth in Dept. of Defense Directive No. 5200.6, dated 22 March 1957.

³¹ This letter outlined the constitutional basis for withholding information and directed members of the Dept. of Defense not to divulge any advice or communications which were exchanged between members of the Executive Branch. For full text see Part 1—A Symposium on Congressional Hearings and Investigations, 14 FED. B. J. 19 (1954).

³² Letter dated April 3, 1952 from former President Truman to the Secretary of State.

³³ *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (1958). It is apparent, therefore, that the principle is applied and recognized not only in congressional-executive relations, but in the judicial-executive area as well. See also Bishop, *The Executive's Right of Privacy, an Unresolved Constitutional Question*, 66 YALE L. J. No. 4 (1957). See also supra note 16.

Despite the reference of the court to an "executive privilege," many proponents of the Amendment—like the plaintiffs in the *Kaiser* case—deny the existence of such a privilege.

pective operations and policy. This goes beyond the disclosure of primary facts upon which conclusions are based." (Page 944, emphasis added.)

The claimant in this case sought to secure a memorandum written by a Special Assistant to the War Assets Liquidator. The Government resisted the motion on the ground that:

"... His duties, at least so far as the contracts here involved are concerned, were confined to recommendations and advice on program policy. He played no part in the operative events involved in this case and had no relations or discussions with plaintiff or its competitor. His use by the Liquidator on the matters here in question was in the nature of a confidential assistant." (Page 943.)

The contractor argued that:

"Defendant has asserted no colorable claim of privilege. It is not claiming attorney client, national secrets or any other privilege recognized in the law of evidence. Its refusal is instead based on grounds which have never been recognized by the courts as privileged—the theory that disclosure of a subordinate's 'advisory' reports would adversely affect agency operations." (Page 943, emphasis added.)

The Court rejected the contractor's contention and stated:

"... Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

"There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action.

"When this Administrator came to make a decision on this \$36,000,000 contract, with intricate problems of accounting and balancing of interests, he needed advice as free from bias or pressure as possible. It was wisely put into writing instead of being left to misinterpretation but the purchaser, plaintiff here, was entitled to see only the final contracts, not the advisory opinion." (Pages 945-946, emphasis added.)

The Court did not merely do lip service to this principle, for it concluded that it would not even require that the document be produced for examination by the Court in order to determine if the Government assertion of privilege was well-founded. After pointing out that the officers of the Court were qualified to appraise the question, it nevertheless concluded that:

"... It seems equally obvious that the very purpose of the privilege, the encouragement of open expression of opinion as to governmental policy is somewhat impaired by a requirement to submit the evidence even uni-

laterally. When the head of an agency claims privilege from discovery on the ground of public interest, which is recognized as a basis for the claim, it seems to us a judicial examination of the sought-for evidence itself should not be required without a much more definite showing of necessity than appears here. * * * To require it here would mean the creation of an absolute right for judicial examination and determination of all evidence whose discovery the executive deemed contrary to the public interest." (Page 947.)³⁴

The problem has another aspect, and it, too, involves a profound element of public interest, for it involves the decision-making process. In any organization, public or private, the authority to make binding decisions is entrusted to given individuals. The outside world has a right to rely upon and even demand that those individuals make and disclose those final decisions. By the same token they do not rely upon, and have no right to demand, the opinions or recommendations given by advisors and subordinates. All of this material, being preliminary in nature, is merged in the final decision. Moreover, in the case of Governmental operations the sovereign is bound by the actions and decisions of its authorized officials. Should it be exposed to added liability on the basis of preliminary decisions or opinions of officials who do not have the authority to make decisions or bind the sovereign?

The problem also has interesting overtones in the field of political science. Does the public have a right to know more than the decision and the identity of the person who was responsible for making it? If this decision is known, and it is an unwise one, cannot the public, thereafter, use its ballot to remove the offending official? If he is not an elective official, cannot his removal be demanded anyhow? Why, then, does the public need the preliminary opinions and the identity of the persons who rendered them?

It can be argued that this policy of protecting internal communications can lead to bureaucratic irresponsibility upon the part of subordinates. That danger is not a completely realistic one, for it is self-evident that the hapless Department head who is criticized for a bad decision will use his internal authority to rid himself of the advisor who gave incompetent advice. Conversely, the Department head who acts as a buffer from external pressures will be insured that his capable subordinates will continue to give forthright and uninhibited opinions.

A Court of Appeals compared this administrative process of making decisions to the judicial process and stated:

"It is true, as argued by appellees, that 'judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers', *United States v. Reynolds*, 345 U. S. 1, 9, 10; 73 S. Ct. 528, 533; 97 L. Ed. 727; and that it is 'the responsibility of all courts to see that no unauthorized exten-

³⁴ Can it be said that the general public has a greater right to demand a document than does a litigant with a tangible and directly identifiable property interest (or the personal interest of an accused in a criminal case)? A similar question was asked about the public's right vis-a-vis Congress. *Supra* note 15.

It is noted, however, that the Courts will order the production of privileged records under the conditions set forth in *Jencks v. United States*, 353 U.S. 657 (1957), but the general public cannot fulfill those conditions.

sion or reduction of jurisdiction, direct or indirect, occurs in the federal system', *Baltimore Contractors v. Bodinger*, 348 U. S. 176, 181; 75 S. Ct. 249, 253; but it should be borne in mind that the Supreme Court has explicitly said that, *just as a judge cannot be subjected to scrutiny as to mental processes and his examination would be destructive of judicial responsibility, so also the integrity of the administrative process must be equally respected*; and that 'it will bear repeating that although the administrative process has had a different development and pursues somewhat different ways from those of the courts, they are to be deemed collaborative instrumentalities of justice and the appropriate independence of each should be respected by the other.' (Citing *United States v. Morgan*, 313 U. S. 409, 422.)³⁵ (Emphasis added.)

In applying this rationale to a request of one litigant for internal reports, the Court concluded that:

"The basis of our decision is, as has been shown heretofore, that the Commission, its General Counsel, and its representatives Rakow and Holden, were within their lawful rights in declining to produce the reports and intra-agency communications demanded by the attorney for plaintiffs and by the district judge. In furnishing freely, as they did, the statements and communications to them by defendants and their attorneys, their correspondence with defendants and their attorneys, and the other data supplied, they performed all that the law required of them." (Page 520.)

It is apparent, therefore, that many critics of the Executive practice of safeguarding internal reports would not make the concession made by the Court. It is anomalous, however that the same individuals probably would be the first to oppose a request for the notes or draft opinions submitted by a law clerk to a judge, or a request for a report of a staff member to a committee of Congress.

(2) Confidential Communications vis-a-vis Privileged Communications.

One of the inherent difficulties in formulating rules for the release of various categories of information is the fact that clear lines of demarcation cannot be drawn between those categories. It has been shown in the earlier discussion that even litigants cannot always compel an opposing party or the Government to produce all documents in its possession. It is worthwhile, therefore, to look to the courts for guidance and to observe the lines which they have drawn. The Court of Appeals for the District of Columbia made the following distinctions:

"The first point here concerns the status of the documents involved; they are official possessions of the F.B.I. The Government repeatedly urges that they are confidential. Only in its brief here, and only in one sentence, does it claim they are privileged. *There is a vast difference between confidential and privileged*. Almost any communication, even an ordinary letter, may be confidential. Such a document may not relate to any matter of high public concern. But privileged means that the contents are of such

character that the law as a matter of public policy protects them against disclosure. A communication from a person to his banker may be confidential, but it is not privileged; certain of his communications to his doctor or his lawyer are not only confidential but also privileged; the law does not permit their disclosure even under *subpoena* by a court. So, too, with Government documents. Some are privileged, such, for example, as the President's *advice in the conduct of foreign affairs and some papers relating to the internal security of the nation*." (Emphasis added.)

After making this distinction, the Court disposed of a request for Government records and set forth the limitations on the release of confidential records:

"... That the documents are merely confidential does not protect them against compulsory disclosure. Of course this does not mean such documents must be produced upon every demand; *good cause for intrusion into confidential files and materiality and relevancy must be shown*. The law in that area is well settled." (Emphasis added.)

The reasons for safeguarding records—either on a confidential or privileged basis—were succinctly stated by the Supreme Court in *Touhy v. Ragen*, 340 U.S. 462, 468 (1951):

"When one considers the variety of information contained in the files of any government department and the possibilities of harm from unrestricted disclosure in court, the usefulness, indeed the necessity of centralizing determination as to whether subpoena duces tecum will be willingly obeyed or challenged is obvious." (Emphasis added.)

III. SECTION 161 OF THE REVISED STATUTES—WHITE ELEPHANT OR USEFUL BEAST OF BURDEN.

An analysis of any discussion of the original provisions of this statute cannot help but conjure up the old fable of the three blind men who were asked to give their impression of an elephant. Like each blind man, the reader's impression will be influenced by the part he happens to touch. Accordingly, the characterizations of the statute cover the whole spectrum from a "housekeeping statute" to a "legislative recognition of an inherent executive power."³⁷ In view of the general nature of the provisions of the statute and the indecisive nature of its legislative history, persuasive arguments can be made to support several divergent positions. However, it does appear that the "housekeeping" cliché is an oversimplification, which has created confusion and misunderstanding.

What is the true scope and purpose of the original statute? Did it merely concern custodial and management functions of the Department head or did it concern a substantive authority to act in these areas? It appears that a more reasoned approach would not exclude either basis.

A. The Narrow View.

Even if this view is taken of the statute's scope, it would appear, nevertheless, that the Department head would be empowered to issue regulations

³⁵ *Communist Party v. Subversive Activities Control Board*, 254 F.2d 314, 321 (D.C. Cir. 1958).

³⁷ *United States v. Reynolds*, 345 U.S. 1, 6, n. 9 (1953). See also Yankwich, *infra* note 46 at 30.

³⁶ *Appeal of United States Securities & Exchange Commission*, 226 F.2d 501, 519 (6th Cir. 1955). See footnote 16, *supra*.

in the areas enumerated by the statute (i.e., personnel, property and records). However, he would have to rely upon other authority—either statutory or constitutional—to take *substantive* action. This is frequently the case. For example, a regulation which concerns the physical confinement of a military prisoner is published pursuant to the Secretary's authority to issue regulations under this statute.³⁸ However, it certainly could not be said that the substantive authority to confine a soldier is derived from this statute, for it is clear that such authority is derived from an independent statute (i.e., the Uniform Code of Military Justice).

B. The Broad View.

Under this approach, it is apparent that the statute is considered to provide a self-contained basis for substantive action. The only requirement is that the provisions not be "inconsistent with law." (It is very significant to note that the regulations governing release of information which were issued pursuant to the original provisions of Section 161 of the *Revised Statutes*, were not inconsistent with any statute or with the Constitution.)

In the *Jencks* case, the Supreme Court cited the regulations of the Attorney General which were issued pursuant to this same statute. The Court noted the need to protect the nation's interests in this manner and stated:

"This has been recognized in decisions of this court in civil causes where the Court has considered the statutory authority conferred upon the departments of Government to adopt regulations not inconsistent with law for . . . use of the records, papers . . . appertaining to his department." (Emphasis added.)³⁹

However, it is to be noted that the source of authority for action taken under the statute (directly or indirectly) need not be the statute itself, for the Supreme Court in *Reynolds v. United States*, 345 U.S. 1, 6, said:

"While claim of executive power to suppress documents is based more immediately upon R.S. § 161 (see *supra*, note 4) the roots go much deeper. It is said that R.S. § 161 is only a legislative recognition of an inherent executive power which is protected in the constitutional system of separation of power." (Emphasis added.)⁴⁰

³⁸ It does not follow that the use of the statute in this manner, as to some activities, means that the Department head cannot also exercise authority of a different character thereunder. (See discussion of broad view, *infra*.) It has been said without distinction that regulations issued in this manner have the force and effect of law. (*Carter v. Forrestal*, 176 F.2d, 364 (D.C. Cir. 1949).)

³⁹ *Jencks v. United States*, 353 U.S. 657, 670 (1957). Certainly this language did not indicate that the Supreme Court viewed the statute as a mere housekeeping authority. (The case was decided against the Government but not upon the question of the authority to issue regulations under this statute.) This case is not an isolated one. The Supreme Court expressed similar views in the old landmark decision of *Boske v. Commingore*, 177 U.S. 459 (1900). For a compilation of cases on this subject, see *Executive Privilege and the Release of Military Records*, *supra* note 26.

⁴⁰ This language appeared in footnote 9. Although the second sentence might represent a comment upon the Government's brief, the first sentence appears to represent a conclusion of the Court. This language is very important in view of the amendment, for now it is clear that it will not impair the inherent and continuing authority of the Executive Power to issue directives to safeguard information which is considered in need of protection to insure the faithful execution of the laws under Article II, Section 3 of the Constitution. See also II, *Moas Committee Hearings*, pp. 2551, 2564, 2565.

The Court of Claims in a recent decision involving the dismissal of an employee, made this observation:

"With respect to the War Department Regulation No. 60 issued pursuant to Revised Statutes, section 161, the majority of this court held that the regulations issued under that statute were merely housekeeping regulations promulgated for the guidance of the officers and agents in the Government departments, and that the violation of discharge procedures contained in such regulations gave no enforceable rights." (Emphasis added.)⁴¹

The Court then discussed the decision of the Supreme Court in *Service v. Dulles*, 354 U.S. 363 (1957) and stated that it had erred in its "housekeeping" conception. It concluded that the regulations were binding upon the Army and upon the Government.

Certainly these cases indicate that the Executive Departments had used the statute properly for many years and had not extended a "housekeeping law" beyond its intended scope in the field of release of information. Can it be said that Congress intended to confer upon the department heads a wider authority over personnel than it did over records? Such a unique and far-reaching distinction would not be easily supported on the basis of the statute's language or its legislative history.⁴²

IV. IS A PUBLIC RECORD PUBLIC?

It is difficult to ascertain the basis for the claim of a virtually unlimited right of the public to know. It is believed that it may stem from a misunderstanding of a "public record."⁴³ The fact that a document is a Government record does not mean that it is in the public domain and that every member of the public should have access to it. In general, his right to see it is subject to the same reasonable limitations as are imposed upon the use of public property. In either case the right is a relative one. A citizen may use a public park or the sports equipment which is provided. However, he cannot demand the use of a publicly-owned grading machine. The result is not changed if he desires to use it in the public park rather than upon a personal project on his own property. If this analogy—and admittedly it is an over-simplified one—is applied to the use of public records, it is found that the public again has access to vast amounts of material. However, its access to other material is limited. A war plan prepared by the Defense Department is a Government-owned record, but should a private citizen be permitted access to it for no other reason than the fact that it is a public record?

The advocates of the right to know concept meet such a question by distinguishing between the public's right to defense information and to non-defense information. This is a distinction, but what is its basis in law or in logic? We

⁴¹ *Helen I. Watson v. United States*, Ct. of Claims No. 49895, decided 4 June 1958. Here then we have a court coming to grips, perhaps for the first time, with the "good housekeeping" label.

⁴² On the related question as to whether the Executive Branch had an authority to make regulations which was independent of the Statute, see *United States v. Reynolds*, *supra* note 37.

⁴³ For example, see definition of government "records" in 44 USC 366 (57 Stat. 380). For the purposes of this Act the term generally covers all documents made or received by any agency of the United States.

have seen in this article that the drafters of the Constitution, and even our present Congress, recognized that non-defense information must be protected. Of course, experienced members of the Executive Branch do, and so do the Courts. In one case, a Court of Appeals approved the action of an agency in withholding a report, and stated:

"Mr. Justice Clark, when Attorney General, stated in his Manual on the Administrative Procedure Act that the great mass of material relating to the internal operations of a governmental agency is *not a matter of official record* nor are *intra-agency* reports of investigations such, reflecting as they do research and analysis preliminary to official action; and that in view of their nature they must commonly be kept confidential." Cited in *In re Appeal of U.S. Securities & Exchange Commission*, 226 F.2d 501, 519, (6th Cir. 1955). (Emphasis added.)

It is to be noted that Justice Clark concludes that documents prepared by public officials in the course of their official duties are not necessarily "official records." Be that as it may, the courts have refused time and again (as in the *Securities & Exchange Commission* case, *supra*)⁴⁴ to compel disclosure of records even though they are so-called official or public records. In other instances—such as the *Jencks* case—the Court compelled the production of safeguarded records. However, in each case the requesting party had to establish that a specific document had a direct and pertinent relationship to an issue before the court—usually a property right or a right to defend himself against criminal charges.

It appears to the writer that, implicit in these requirements which the Court imposes upon actual litigants is the conclusion that *every member of the public does not have a right of access to every Government record*. The same conclusion is implicit in every statute passed by Congress which prohibits release of certain types of records (e.g., income tax returns, trade secrets, and the like.) Are not these statutes express legislative determinations that the public interest does not permit public access to certain Government records?

It is self-evident, therefore, that each Department head has the right and duty not only to protect many types of records which Congress has specifically designated for protection,⁴⁵ but also others which have not been. In the past, Section 161 of the *Revised Statutes* was used, properly, as a *procedural* device to insure that protection to both categories. Justice Reed, in the case of *Touhy v. Ragen*, *supra*, considered the device to be useful and necessary in the courts. It is eminently reasonable to conclude that similar procedures are even more useful and necessary to regular requests which are made outside of court.

The author realized that as a member of the Executive Branch (albeit as a career official) his bureaucratic conclusions would not be viewed as unbiased. Accordingly, he sought to find an individual whose writings would be accepted as objective. Fortunately, his attention was directed to a learned and incisive discussion by Judge Leon Yankwich at a conference held at Marquette University in March 1956 on the subject of "Problems of Communication in a Plural-

⁴⁴ *Supra* note 39.

⁴⁵ It should be remembered, however, that if Congress withdrew its designation, the President would have a duty under the Constitution to decide if he should protect the information; *Supra* note 7, 40.

istic Society." The remarks of this distinguished jurist would give slight comfort to the official who arbitrarily withheld information from the public; however, he concluded that:

"Grant that: 'Public business is the public's business;' that the right to free flow of information about such business is a right of which each public official is a trustee and that the right to refuse disclosure if carried to the extreme may breed tyranny. Nevertheless, on the federal level, it has Congressional sanction not only in the section cited (5 USCA, § 22) but in others, which justify refusal of information even to other agencies, '. . . when compliance will be injurious to the public interest.'

"Frankly, I see no reason why the right of access should be made absolute in all cases, without restrictions. Even the great guarantees of the First Amendment,—including the Freedom of the Press,—are not absolute and uncontrollable. And so long as the refusal to grant access to interested persons, including the public, is reviewable by courts against abuse, I cannot see why the government cannot make access dependent upon the wise discretion of the responsible heads of the government.

"At times, newspapers insist that all preliminary steps in an administrative, executive or legislative matter be thrown open to the public. This would not always work in the public interest. * * * In my view, only documents which present *ultimate action* should be open to the public. Those which are only part of the preliminary steps by which the conclusion is reached should become public only in the discretion of the particular agency, subject to judicial review in proper cases." (Emphasis added.)⁴⁶

CONCLUSIONS

It is believed that the following conclusions can be drawn on this subject:

1. The drafters of the Constitution imposed at least one express limitation upon the public's right to know.
2. Moreover this authority which was granted to withhold information from the Journal was not limited to military and state secrets.
3. It appears that the considerations outlined by Franklin and the other drafters of the Constitution (which concerned the safeguarding of the minutes of the Convention) are as applicable to the operations of the Executive Branch as they are to the Legislative Branch. Certainly they did not intend a double standard which would protect their own work notes and exchanges of views, but would deny this protection to the officials of the Executive Branch (or the Congress) who would operate under the Constitution created by them.
4. Congress has also limited the public's right to know in the following respects:
 - a. In connection with release of information of its own activities, and
 - b. By passing statutes which limit the disclosure of the contents of certain records to interested persons and agencies.

⁴⁶ Yankwich, *Legal Implications of, and Barriers To, the Right to Know*, 40 MARQ L. REV. 8 (1956).

5. The courts require a litigant to establish that information is material and relevant to the issues before the Government is required to produce a record. Even then the court might hold that a sufficient showing was not made. Accordingly, it does not appear that a member of the general public can have a greater right.

6. For many years, the original provisions of Section 161 of the *Revised Statutes* were used by the Executive Branch in a manner which the courts found to be consistent with the statute's purpose.

7. The amendment of the Statute will leave intact the inherent constitutional power which is possessed by the Executive Branch.⁴⁷

GOVERNMENT OPERATIONS AND THE PUBLIC'S RIGHT TO KNOW

J. R. WIGGINS *

The United States Constitution and the government which it summoned into being were shaped by the great liberating forces of a period in human history most distinguished by sweeping gains in human rights, and by the broadest acceptance of the idea that man is a rational creature, entitled to know about his own governance and to have a voice in it.

The spirit of this period, running through the Eighteenth and into the Nineteenth Century, is reflected in this paragraph by John Stuart Mill:

"As between one form of popular government and another, the advantage . . . lies with that which most widely diffuses the exercise of public functions; on the one hand by excluding fewest from suffrage; on the other, by opening to all classes of private citizens, so far as is consistent with other equally important objects, the widest participation in the details of judicial and administrative business; as by jury trial, admission to municipal offices, and above all by the utmost possible publicity and liberty of discussion, whereby not merely a few individuals in succession, but the whole public, are made to a certain extent participants in the government and sharers in the instruction and mental exercise derivable from it."

One by one the great edifices of restraint and restriction upon the acquisition of knowledge, erected by Henry VIII, had been dismantled. In the English speaking world, the people gained, one by one, those rights indispensable to the participation of the citizen in the enterprise of government. Licensing was abolished. The doors of legislative assemblies were opened to the public. Court proceedings were made public. The menace of trials for seditious libel was diminished by the precedent of the *Zenger* case in America and the Fox Libel Act in England.

It was as though there had gone echoing down through the decades John Milton's great question, propounded in 1644:

"What a collusion is this, when as we are exhorted by the wise man to use diligence, to seek for wisdom as for hidden treasures early and late, that another order shall enjoin us to know nothing but by statute?"

By words and deeds the liberal statesmen of the Eighteenth Century Enlightenment had answered the question.

Citizens, in the view of prevailing opinion by the middle of the Eighteenth Century, not only had a right to access to information about their government, but a duty to acquire it. The view expressed in the *London Magazine* of 1747, was representative of contemporary liberal thought:

"Every subject not only has the right, but is duty bound, to inquire into the public measures pursued; because by such an enquiry, he may

⁴⁷ See statement of the President, *supra* Note 7. Cf. conclusion in Mitchell, *supra* note 2 at 208.

* Vice President and Executive Editor, The Washington Post and Times Herald. For biographical sketch see p. vi.

discover that some of the public measures tend toward overturning the liberties of his country; and by making such discovery in time and acting strenuously, according to his station, against them, he may disappoint their effect. This enquiry ought always to be made with deference to our superiors in power but it ought to be made with freedom and even with jealousy."

Well into the Nineteenth Century it was the sense of public men that the right to know and the right to participate in government went hand in hand. As Lord Macaulay put it:

"It is quite natural that a government which withholds political privileges from the commonalty should withhold also political information. But nothing can be more irrational than to give power, and not to give the knowledge without which there is the greatest risk that power will be abused."¹

These ideas were shared by the Americans who framed the Constitution and by those who administered the government in the earliest decades of its history. A few quotations will suffice to show how universal was the belief that citizens must have information about their government.

"My own opinion is that government should by all means in their power deal out the material information to the public in order that it may be reflected back on themselves in the various forms in which public ingenuity may throw it."²

"Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives. A popular government without popular information or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both."³

"To the people every department of the Government and every individual in each are responsible, and the more full their information the better they can judge the wisdom of the policy pursued and the conduct of each in regard to it."⁴

"In proportion as the structure of government gives force to public opinion it is essential that public opinion should be enlightened."⁵

"To cover with the veil of secrecy the common routine of business is an abomination in the eyes of every intelligent man and every friend of his country."⁶

It would have been a monstrous and unnatural thing indeed if such men in such an age had shaped a new government, otherwise hailed for its liberal innovations throughout the world, so as to confer upon it the unlimited, discretionary, unreviewable, non-justiciable right to withhold from citizens anything that the government chose to suppress.

¹ 4 MACAULAY, THE HISTORY OF ENGLAND 347 (1850-61).

² 19 JEFFERSON, WRITINGS 121 (1903).

³ PADOVER, THE COMPLETE MADISON 337 (1953).

⁴ Seventh Annual Message of President James Monroe.

⁵ George Washington's Farewell Address.

⁶ Statement of Patrick Henry, 3 ELLIOT, DEBATES 170 (1787); quoted in Reynolds v. United States, 192 F.2d 987, 995 (3d Cir. 1951).

That they did not so intend is evident in their own views, in the language of the First Amendment, and in the construction that has been placed upon that Amendment by the courts.

Harold Cross, in *The People's Right To Know*, has cited many of these opinions, indicating how clearly the courts have understood the intent of those who shaped the American government. Notable among them is this United States Supreme Court opinion:

"... it goes to the heart of the natural right of the members of an organized society, united for their common good, to impart and acquire information about their common interests."⁷

As Thomas Cooley, the great American law writer, has pointed out, the purpose of the framers of the First Amendment was to prevent "any action of government by means of which it might prevent such a free and general discussion of public matters as is essential to prepare the people for an intelligent exercise of their rights as citizens."⁸

DETERIORATING RIGHT OF ACCESS

Notwithstanding these great beginnings in the Eighteenth Century, and in spite of the opinions of the courts, in almost every instance that the opportunity to pass upon these issues has presented itself, there has been a practical deterioration in the right of the public to have access to information about their own government, and most notably in the case of the Executive Branch of the Federal Government.

This has been due to the increasing responsibilities entrusted to government, to the impact of two world wars and a period of cold war, to the transfer of quasi-judicial and legislative functions to executive agencies, and to a diminishing faith in the ability of the people to use information wisely.

Numberless examples of withheld information illustrate how far we have come from the concept of the philosophers of the Enlightenment, how great a distance we have travelled from the fundamental faith of the early founders. We have allowed to prevail an enormous area of secrecy sustained by nothing but the mere assertion of executive right, the failure of Congress to assert its prerogatives, the unwillingness of the public to use political weapons at hand for the purpose of compelling a closer conformity to the ideas of open conduct in which our government was conceived.

It is not possible to reconcile with our earlier principles withholding of information such as that involved in these representative examples:

The United States Treasury Department for years declined to release the names of applicants for bank charters.

The Office of Price Administration, for years, operated under rules preventing the release of names of persons who had exceeded price ceilings.

The United States Treasury acknowledged only in 1953 that tax compromises and abatements ought to be made public but legislation putting this principle into effect has been long delayed.

⁷ Grosjean v. American Press Co., 297 U.S. 233 (1936).

⁸ 2 COOLEY, CONSTITUTIONAL LIMITATION 885-86 (8th ed. 1927).

For years after the inauguration of the Agricultural Adjustment program in 1933, the names of the recipients of Federal payments were kept secret.

Names of persons getting drought aid were kept secret under Department of Agriculture regulations until December 1953 when new regulations were adopted.

For years the names of persons getting Agricultural Stabilization and Conservation Service loans were secret.

Information on loans by the Reconstruction Finance Corporation were secret until the disclosures in Congressional investigations in 1950-51, after which a "goldfish bowl" policy was announced.

For three years the Public Housing Administration refused to give out the names of its employees.

Proceedings of numberless advisory committees, on the recommendation of which executive departments frequently make the most important policy decisions, are concealed from the public and the views and votes of individual members suppressed.

Applications for tax exempt status were concealed by the United States Treasury until amendments adopted in 1957 compelled disclosure.

The Civil Service Commission, until recently, refused to make public the names of candidates eligible for appointment to local postmasterships.

The Treasury Department only recently agreed to abandon a policy of keeping secret the administrative settlement of fines, penalties, and forfeitures for import law violations.

The Federal National Mortgage Association withheld changes in mortgage purchase prices until a recent change in policy.

The Panama Canal administration withheld the names of Congressional personnel who had traveled without charge on its shipping line.

The Civil Service Commission withheld statistical breakdowns of Federal dismissals under the loyalty program.

* * * * *

These examples are representative of the concealment by which the day-to-day routine operations of the Federal Government have been put beyond public examination and appraisal. Some commotion has been made about these cases, but like the visible portions of icebergs they are only indicative of the great mass of information to which the public is being denied access on the mere say-so of subordinate personnel. For every case that comes to public attention there are hundreds more where the inquiring citizen has meekly accepted the negative of a government agent. Moreover, a citizenry that is frequently rebuffed gradually is made to understand that the business of the government is not its business, and questions that ought to be asked, and answered, never get asked at all as government succeeds in making it plain that there are whole areas of its operations where the presence of the inquiring citizen is unwelcome.

The Defense Establishment and related establishments traditionally have been marked by greater secrecy than other Federal agencies. Experience with censorship in two world wars and in the cold war period has greatly accelerated the normal disposition of military personnel to withhold information. The

defense operations have come to involve some two-thirds of the Federal expenditures and two-thirds of all Federal personnel. Secrecy in so large a part of government operations has enormous consequences on policy. Here is a Federal endeavor on which the survival of the nation ultimately may depend. Its expenditures are so great that its efficiency and economical operation is of the greatest concern to every citizen.

The quarrel here is over the degree of secrecy allowable in a democratically governed country. That some secrecy in the conduct of defense preparation and planning must be exercised is widely conceded. It is important that government wisely decide how much is necessary and how that necessary secrecy is to be administered.

The House Committee on Government Operations, through the Subcommittee on Government Information, in its extensive examination of the Defense Establishment policies certainly disclosed that secrecy has been pushed very far.

It turned up such ludicrous examples of secrecy as these:

- (1) The suppression of a list of military installations which sell packaged liquor to servicemen.⁹
- (2) Classification of a report on the use of shark repellents, in which were detailed 69 cases of shark attacks, 55 between 1907 and 1940.¹⁰
- (3) Description of a bow and arrow was classified during the war and kept classified "confidential" until after hearings in 1958.¹¹
- (4) The Office of Security Review, in the Defense Establishment, solemnly reviewed for security clearance a review of a Civil War book entitled *Destruction and Reconstruction*, written by a Confederate Army General and first published in 1879.¹²

Other examples of ridiculous application of Executive Order 10290 and 10501¹³ might be cited, but of far greater seriousness has been a progressive diminution of the flow of information to Congress and to the country, about the operation of the Defense Establishment.

Arthur Smithies has discussed the dilemma of security and safety, in these words:

"There is one perplexing dilemma connected with the defense budget . . . The provision of the information needed for an adequate Congressional or public appraisal of the budget necessarily increases the information available to the enemy. Is the Congress, except for a privileged few of its members, to be kept in ignorance on security grounds? Or is the enemy to be fully informed for the sake of the effective working of our political system? Obviously neither of these extreme views is acceptable, and a compromise between them is needed. . . . There is considerable likelihood, however, that the Congress may be less well informed than the enemy."¹⁴

⁹ H.R. Rep. No. 1884, 85th Cong., 2d Sess. 5 (1958).

¹⁰ *Id.* at 125.

¹¹ *Id.* at 10.

¹² *Id.* at 45.

¹³ Exec. Order No. 10290, 16 Fed. Reg. 9795 (1951), Exec. order No. 10501, 18 Fed. Reg. 7049 (1953).

¹⁴ Smithies, *The Budgetary Process in the United States*, Committee on Economic Development report, p. 276.

One witness after another before the Moss Committee agreed that there had been a vast over-classification and a lagging program of declassification.

Charles A. Coolidge, Chairman of the Coolidge Committee which studied classification problems for the Defense Establishment, on March 11 and 12, told the Moss Committee:

"I think it fair to say that we have corroborated what your committee has felt, and that is there is too much information being withheld.

"... we found that the classification system, particularly confidential, was used for matters that appeared to us to be administrative and not to have a national security aspect.

"We found, my recollection is, nobody in the Department of Defense that doesn't agree that there is overclassification."¹⁵

Retired Admiral William Fechteler, a member of the Coolidge Committee, stated:

"I would say that practically every one of the people with whom we conferred agreed that there was a bad problem, and from my own personal knowledge, having been on duty in the Pentagon for several years, I considered that there was overclassification, and there are instances where documents are classified that probably shouldn't have been classified at all."¹⁶

Lt. Gen. John E. Hull testified:

"There is no question in my mind, and I don't think there is a question in anybody's mind who has been in this game that there is quite a bit of overclassification. It is a problem."¹⁷

The withholding of information by Defense Establishment agencies has not been confined to matter classified under Executive Order 10501 providing for the retention of matter the release of which would prejudice national security. In its report of June 6, 1958, the Moss Committee concluded:

"The Department of Defense has staked out an exclusive proprietary claim to every bit of public information in its possession. Under a directive of March 22, 1957, the areas of administrative information to be withheld are unlimited. There is virtually no information which a member of the public or the press can expect to obtain as a matter of course. . . . The withholding of non-security information about day to day operations of the Department of Defense has been carried to an extreme degree, beyond any authority traceable to law or to the Constitution."¹⁸

NON-GOVERNMENTAL SECRECY

It is not only information in the possession of the Government that has been affected by legislation and by the acts of the Executive. The Atomic Energy

¹⁵ H.R. Rept. No. 1884, 85th Cong., 2d Sess. 100 (1958).

¹⁶ *Id.* at 100.

¹⁷ *Id.* at 100.

¹⁸ *Id.* at 157.

Act¹⁹ created, for the first time in American history, areas of restricted information outside the custody of government, the possession of which rendered the individual citizen subject to punishment. Other programs have interfered with the exchange of scientific information of all kinds, between American scientists and foreign scientists. The extension of Defense Establishment regulations to military suppliers has brought vast areas of private industry within the purview of security officers. Contracts with colleges and universities under which classified work is undertaken have extended the influence of secrecy precautions to college laboratories and facilities.

The whole vast complex of devices utilized in the suppression and withholding of information not only threatens the normal processes of public enlightenment upon which the democratic process depends, but, as the testimony of many scientists has divulged, it also threatens scientific progress and even the military security that depends upon that progress and in the name of which the secrecy was invoked in the first place.

Here is what some of them have had to say:

Dr. M. Stanley Livingston, Professor of Physics, Massachusetts Institute of Technology:

"To me it seems essential that the present system of information security be revised if our country is to achieve that long-range strength in scientific and technical productivity required for survival in a modern world.

"I don't mean to be facetious, but I really feel that there is a possibility that if we had no security restrictions whatsoever, we might be further ahead of potential enemies today than we are at the present. I have considered this at some length. I think it is entirely possible from the balance of risks and the speed of development point of view that it might be possible that zero security might have led to more progress."

Lloyd V. Berkner, President of Associated Universities:

"By 1945 the United States held unquestioned technological supremacy in both civil and military development. . . . Since that time we have steadily lost ground relative to our competitors until now there is serious question whether the United States actually retains leadership in certain critically important fields of military technology. That this is so, in my opinion, lies not so much in the faster progress of other nations as in the slowing down of our own technological achievement. In my opinion, an important aspect of this loss of supremacy in certain vital fields of technology stems from our present widespread practice of technological secrecy, consequent clearance and security practices, compartmentalization of science and technology and restrictive practices exercised over science and scientists."

Dr. Elmer Hutchisson, Case Institute of Technology:

"In a democracy, the best safeguard against mediocrity is public criticism. If government-sponsored research work is kept secret and is not put into public competition with free knowledge, the work is very likely to suffer and public funds will be very ineffectively used. It is only natural

¹⁹ Atomic Energy Act of 1954, 68 Stat. 919 (1954), 42 U.S.C. § 2011 (Supp. V, 1952).

"that if the stamp of secrecy is freely used, it may be used to cover up mediocrity, inefficiency, complacency and even complete incompetency."

Dr. Harold C. Urey, University of Chicago:

"... we should recognize that all scientific and engineering knowledge can be learned by others without our help in any way. . . . Secrets about such things will always be lost completely in time, and in the technically advanced countries this time is short. . . . We recognized that maximum secrecy is not the optimum way to promote security."

Dr. Edward Teller:

"It would seem to me that henceforth it is less important to keep our secrets and more important to produce additional knowledge and additional technical tools. Our security lies in speed; our allies could be most helpful in our efforts to attain it."

Dr. Chauncey D. Leake, National Academy of Science:

"Before this bureaucratically imposed secrecy destroys what it purports to preserve, would we not be wise to reconsider it as a national policy, and try instead to restore science to its traditional free, open and democratic state, so that scientists may really help to protect and to extend those freedoms which we profess to cherish?"

Dr. V. Lawrence Persegian, Dean of Engineering at Rensselaer Polytechnic Institute:

"The government's heavy secrecy control has discouraged thousands of top scientists in American colleges from adding their talents to solve the key problems of the guided missile, satellite, atomic energy and other major technical projects."

* * * * *

Access to information in the executive agencies of government, it is perfectly clear, is obstructed by many barriers. The legal right of citizens to compel disclosure in the federal government lags far behind that right as it has been stated by legislatures and acknowledged by state courts, where state government agencies are concerned.

"The dismaying, bewildering fact is that in the absence of a general or specific act of Congress creating a clear right to inspect—and such acts are not numerous—there is no enforceable legal right in public or press to inspect any federal non-judicial record."²⁰

The barriers to access consist of:

- (1) More than 60 specific acts of Congress which deny inspection of or restrict or prohibit access to particular records or proceedings.
- (2) Title 18, United States Code, section 1905, which is captioned "Disclosure of Confidential Information Generally" and provides for confidentiality for wide areas of information.
- (3) Sections of numerous other acts of Congress relating to individual executive departments.

²⁰ CROSS, THE PEOPLE'S RIGHT TO KNOW 197 (1953).

(4) Title 5, United States Code, Section 1002, the Administrative Procedure Act.

(5) Title 5, United States Code 22, the house-keeping statutes, authorizing heads of departments to have custody of files and papers which, by construction, has been made the basis for withholding information.

(6) Executive Order 10501 governing the classification of military information.

"The condition of the law, so far as declared now, is that, in the absence of general or specific acts of Congress affirmatively creating clear, mandatorily required rights to inspect—and such acts, relatively, are not numerous—there is no enforceable legal right to inspect any Federal non-judicial record. (U. S. ex rel. Stowell v. Deming et al., 19 F.2d 697, App. D.C. 1927; *cert. den.* 275, U.S. 531, 1937; and quotations therefrom)."²¹

The situation was improved by the passage of Public Law 85-619. This law amends 5 U.S.C. § 22,²² which provides:

"The head of each department is authorized to prescribe regulations not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers and property appertaining to it."

No statute has been more frequently cited as the justification for refusal to disclose information. The statute was passed in 1789, by the same Congress that approved the Bill of Rights, and it is simply inconceivable that such a body could have intended to confer upon federal employees such a sweeping authority for non-disclosure as it is now claimed that this measure provides. For decades it was accepted as a house-keeping statute only. Then in 1877, when Talcott Williams of the San Francisco Chronicle asked to see a list of federal job nominees, he was denied the information on the basis of this statute.

The law added this single sentence to 5 U.S.C. § 22: "This section does not authorize withholding information from the public or limiting the availability of records to the public."²³

The amendment of this law leaves intact the control of department heads over their subordinates, in the custody and keeping of papers, but 5 U.S.C. § 22 could no longer be used on the mere say-so of the meanest federal functionary as authority for the withholding of information.

Dr. Harold Cross thinks it largely due to the broad, unlimited and ill-defined powers asserted under 5 U.S.C. 22 that there is not a single recorded case in which a citizen has been able to establish a legal right to inspect a federal non-judicial record (aside from cases involving production of information as evidence in litigation).

Amendments to 5 U.S.C. § 1002, the Administrative Procedures Act,²⁴ also have been proposed, so as to open to citizens (and not to litigants and counsel only) matters not now available to the public.

²¹ Testimony of Harold Cross, *Hearing Before The Subcommittee on Constitutional Rights of the Senate Judiciary Committee on S. 921*, 85th Cong., 2d Sess., pt. 2, at 649.

²² REV. STAT. § 161 (1875), 5 U.S.C. § 22 (1952).

²³ Public Law 85-619, 85th Cong., 72 Stat. 547 (1958).

²⁴ Administrative Procedure Act, 60 Stat. 237 (1946), 5 U.S.C. § 1002 (1952).

All ten federal departments resisted the amendment of 5 U.S.C. § 22 and sought to preserve the construction of the Act as a sweeping, undefined, absolute barrier to legally enforceable inspection of public proceedings and records.

Barriers to access as high as mountain ranges remain, even though 5 U.S.C. § 22 has been amended. If it is restored to its initial purpose and scope, however, the posture of the statutes will be similar to that which exists in some other countries, where there is either an implied or express constitutional assurance of right of access, limited only by specific statutory exemptions and exclusions.

Sweden is one country that has an express constitutional provision, with arrangement for specific, narrowly defined statutory exceptions. It provides: "To further the free interchange of opinion and general enlightenment every Swedish citizen shall have free access to official documents in the manner specified below. This right shall be subject only to such restrictions as are required out of consideration for the security of the realm and its relations with foreign powers, or in connection with official activities for inspection, control or other supervision, or for the prevention and prosecution of crime or to protect the legitimate economic interests of the State, communities and individuals, or out of consideration for the maintenance of privacy, security of person, decency and morality. The specific cases in which official documents are to be kept secret, according to the aforementioned principles, shall be closely defined in a special statute enacted jointly by the King and the Parliament."²⁵

A notable aspect of the Swedish system is that citizens have access to administrative courts which rule as to whether or not, in specific cases, administrative agencies have improperly withheld information. Other interesting characteristics of the Swedish system are:

"The citizen who wants to see a document is not obliged to give any reasons or to say for what purpose he wants it. Nor has he to show that he has a legal interest in seeing a document. His right should not be confounded with the right of 'parties' . . .

" . . . authorities are under observation not only after a decision is taken but also at the preparatory stage."²⁶

The number of cases brought under the Swedish system has not been great. Press appeals have been notably few, as Nils Herlitz points out, because "They want as a rule to see the documents immediately." Courts in the United States, also, no doubt, would be too slow to serve the purposes of the daily press, in many cases, but, as seems to be the case in Sweden, the fact that disputes over access are justiciable seems to keep down the cases of withholding of information.

THE CONSTITUTIONAL QUESTION

The theory that the United States Constitution expressly by the First Amendment, and implicitly as a charter of a self-governing society, assures the right of citizens to information seems often to live in restless contradiction with theories often advanced by the executive departments that there is an absolute, unilateral, discretionary, unreviewable and non-justiciable power of executive

²⁵ Herlitz, *Publicity of Official Documents in Sweden*, PUBLIC LAW 50 (1958).
²⁶ *Id.* at 54-56.

agencies to withhold from Congress, the Courts or the public anything they choose not to disclose.

It is true that the United States Supreme Court never has compelled the Chief Executive to disclose matter which he, in the public interest, felt compelled to conceal. It is also true that the United States Supreme Court never has passed upon the matter at all, and that it has in many opinions acknowledged that each branch of the government after all, is bound by the intent of the Constitution.

This is not to say that there are no circumstances in which the President may, under the Constitution, withhold information. It is rather to assert that many of the precedents for such non-disclosure illuminate some of the specific circumstances under which Chief Executives have withheld information for stated cause, to the satisfaction of Congress or the Courts. The very pains they have taken to explain the exceptional circumstances governing their refusal are themselves eloquent testimony to the generally acknowledged right to know from which, for stated reasons, they have departed.

It is quite true that under *Marbury v. Madison*,²⁷ no mandamus to compel the Chief Executive to perform his constitutional function is ever likely to run. It is surely unlikely that any Congress would use the impeachment power against a President for reasoned withholding of information in the public interest. Neither of these premises argues against the existence, by express guaranty and powers inherent in a self-governing society, of the public's general right to information about the executive establishment's operations. This right, like many rights, is not unlimited, when it is inconsistent with other constitutional rights. What these limiting "other rights" are is apparent in some of the examples of presidential discretion that have been put forward to support the doctrine that would turn the Constitution upside down and make it state that citizens have no right to information except when the executive departments wish to give it to them.

There have been a great many comments on the legal and constitutional aspects of this proposition, by lawyers and courts more competent than laymen to deal with such issues. Some of the most interesting of these include the following:

Vice President Richard M. Nixon (then Representative):

"I am going to address myself to a second issue which is very important. The point has been made that the President of the United States has issued an order that none of this information can be released and that therefore the Congress has no right to question the judgment of the President. I say that that proposition cannot stand from a constitutional standpoint or on the basis of the merits for this very good reason, that would mean that the President could have arbitrarily issued an Executive Order in the *Myers*²⁸ case, the *Teapot Dome*²⁹ case, or in any other case denying the Congress information it needed to conduct an investigation of the executive department and the Congress would have no right to question his decision."³⁰

²⁷ 1 Cranch (5 U.S.) 137 (1803).

²⁸ *Myers v. United States*, 272 U.S. 52 (1926).

²⁹ *McGrain v. Daugherty*, 273 U.S. 135 (1927).

³⁰ 94 CONG. REC. 4783 (1948).

The merits of this particular dispute aside, and many authorities believe that there was particular and specific sanction for the President's withholding, what is pertinent in the then Congressman's remarks is the denial of broad, unreviewable presidential discretion.

The United States Supreme Court has not handed down any decision directly to this point. In a study entitled, "*Is a Congressional Committee Entitled to Demand and Receive Information and Papers from the President and the Heads of Departments Which They Deem Confidential in the Public Interest*,"⁸¹ laid before the House Committee on Government Operations in 1957, by the Department of Justice, there is this frank statement of the situation in the highest Court:

"None of the foregoing cases involved the refusal by a head of a department to obey a call for papers or information. There has been no Supreme Court decision dealing squarely with that question."⁸²

The Justice Department memorandum then quotes the following:

"The committees of earlier years did, on occasion, encounter refusal by administrators to supply information. But, because both the Senate and the House eventually retreated upon the flat refusal of the executives to answer questions, the legal problems which are involved were never presented to the courts. Thus, it remains an open question whether the executive officers must submit all the information which Congress may request."⁸³

It should be added that on many occasions where the executive protested and declared its intention to refuse the information, it eventually yielded to Congress, too.

In the state governments, on the contrary, there have been many decisions adverse to the proposition that state executive departments enjoy broad, sweeping, immunity to compulsory disclosure.

The Supreme Judicial Court of Massachusetts, passing upon the refusal of an official of the executive branch to produce a record demanded by the State Senate and dealing with the express declaration on separation of powers in that State's Constitution, rejected the separation of powers doctrine, relied upon to support the 'executive privilege' claim, and ruled for disclosure.⁸⁴

The high court of Arizona has held, in a disclosure case in which the Attorney General claimed the Governor sole judge of information to be released, "Certainly this court will not go so far as to approve the position of the Attorney General that the Governor of the state is the sole judge as to what information regarding the affairs of his office should be made public. This, we believe, is inconsistent with all principles of Democratic government . . . but under no circumstances should his determination be final."⁸⁵

⁸¹ Memorandums of the Attorney General, compiled by the Subcommittee on Constitutional Rights of the Senate Judiciary Committee, 85th Cong., 2d Sess.

⁸² *Id.* at 62.

⁸³ McGeary, *The Development of Congressional Investigative Power*, 102-04 (1940).

⁸⁴ Opinion of the Justices, 328 Mass. 655, 102 N.E. 2d 79 (1951).

⁸⁵ Mathews v. Pyle, Governor, 75 Ariz. 76, 271 P.2d 893 (1952).

A Federal Circuit Court of Appeals has said:

"Moreover, we regard the recognition of such sweeping privilege against any disclosure of the internal operation of the executive departments of the Government as contrary to a sound public policy . . . It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure might gradually be enlarged by executive determination until, as is the case in some nations today, it embraced the whole range of governmental activities."⁸⁶

The Federal Courts, too, have not looked favorably on the theory that federal agencies can determine for themselves whether their refusal to disclose is in conformity with a statute. For example, in *Morris v. A. T. & S. F. Ry.*,⁸⁷ it was declared:

"Although each Governmental agency is authorized to prescribe regulations, not inconsistent with law, for the government of its own organization and the conduct of its subordinates, it is not the exclusive right of any such agency to determine for itself the privileged nature of any of its records or documents. . . . the court, not a Governmental agency, ultimately must determine the question of privilege."⁸⁸

Another notable comment on the legal issues involved in the often asserted "executive privilege" to withhold is that of Dean Wigmore:

"But the solemn invocation, in the precedents above chronicled, of a supposed inherent secrecy in all official acts and records, has commonly been only a canting appeal to fiction. It seems to lend itself naturally to mere sham and evasion. . . . But the vast extension, in modern times, of administrative laws regulating the affairs of the individual citizens, is presenting a large scope for this claim of privilege. The possibilities of such abuse are plainly latent in this supposed privilege. . . . The menace which this supposed privilege implies to individual liberty and private right will justify us in repudiating it before it is solidly entrenched in precedent."⁸⁹

There certainly are numerous situations in which the executive departments may withhold records and information which are lawfully secret, confidential or otherwise not subject to compulsory disclosure, pursuant to valid acts of Congress or to controlling judicial decisions concerning evidentiary or testimonial privileges. Some of these have been referred to earlier, including those under more than 60 express statutes. That the President himself enjoys practical immunity from the enforcement of legal process in wide areas must be acknowledged. What is most disquieting, however, is the claim of privilege by hosts of federal officials to whom no such executive immunity extends who

⁸⁶ *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), *rev'd on other grounds*, *United States v. Reynolds*, 345 U.S. 1 (1953).

⁸⁷ 21 F.R.D. 155 (W.D.Mo. 1957).

⁸⁸ *Ibid.*

⁸⁹ 8 WIGMORE, EVIDENCE §§ 3267-79 (3d ed. 1940).

frequently assert presidential authority in situations of which the President is often unaware.

In a memorandum on Congressional powers previously referred to⁴⁰ the Department of Justice has stated these propositions:⁴¹

"[1] For over 150 years—almost from the time that the American form of government was created by the adoption of the Constitution—our Presidents have established, by precedent, that they and members of their Cabinets have an undoubted privilege and discretion to keep confidential, in the public interest, papers and information which require secrecy. . . .

"[2] Courts have uniformly held that the President and the heads of departments have an uncontrolled discretion to withhold the information and papers in the public interest, and they will not interfere with the exercise of that discretion."

These sweeping propositions are not sustained by the argument made in this memorandum. The second proposition is not consistent with some of the cases cited above. The first proposition is not supported by the record of early presidential precedents on which it rests.

THE HISTORICAL PERSPECTIVE

The historical background for this sweeping claim of absolute privilege first appeared in *The Federal Bar Journal* of April 1949, in an article by Herman Wolkinson, entitled *Demands of Congressional Committees for Executive Papers*. It is the source document for the statement which the Department of Justice submitted in 1954, accompanying President Eisenhower's letter to the Secretary of Defense of May 17, 1954. It has been drawn upon for the somewhat enlarged memorandum which Attorney General Rogers submitted to the House Committee on Government Operations and to the Senate Subcommittee on Constitutional Rights. The Wolkinson article concluded with the statement:

"In the great conflicts which have arisen, in the administrations of Washington, Jackson, Tyler, Cleveland, Theodore Roosevelt, and Herbert Hoover, the Executive has always prevailed."

This contention is simply not supportable even on the basis of the historical episodes to which Mr. Wolkinson alludes and which the Department of Justice has incorporated in its memorandum. Space does not permit or time allow the examination of all these historical incidents but it is worth while to examine at least the early episodes which were of such importance as precedents and on which the Wolkinson article and the Justice Department memoranda lay such stress. The memorandum of 1952 is the source of the quotations used in this effort to refresh historical perspective.

THE ST. CLAIR EPISODE

As the memorandum states, in March 1792, the House of Representatives passed the following resolution: "Resolved, That a committee be appointed to

⁴⁰ *Supra* note 31.

⁴¹ *Hearings on S. 921 Before the Subcommittee on Constitutional Rights of the Senate Committee on the Judiciary*, 85th Cong. 2d Sess. 75 (1958).

inquire into the causes of the failure of the late expedition under Major General St. Clair, and that the said committee be empowered to call for such persons, papers, and records as may be necessary to assist their inquiries."

This resolution related to the disaster encountered by General St. Clair's force of 1400 men on Nov. 3, 1791, when it was surprised by an Indian attack near a Miami settlement, in which 900 men were lost and the command driven back in disorder.

Before establishing the Congressional committee of inquiry, the House had debated a resolution calling upon the President to undertake such an inquiry but had decided against this course.

Says the Attorney General's memorandum:

"... when the committee was bold enough to ask the President for the papers pertaining to the General St. Clair campaign, President Washington called a meeting of his cabinet."

A description of this meeting [there were really two meetings] is taken from Jefferson's notes, which repeat this conclusion of the Cabinet:

"First, that the House was an inquest, and therefore might institute inquiries. Second, that it might call for papers generally. Third, that the Executive ought to communicate such papers as the public good would permit, and ought to refuse those, the disclosure of which would injure the public; consequently were to exercise a discretion. Fourth, that neither the committee nor the House had a right to call on the head of a department, who and whose papers were under the President alone; but that the committee should instruct their chairman to move the House to address the President."

This account of the Cabinet's conclusion was obtained from Thomas Jefferson's writings, but it is not a full account. Thomas Jefferson, in relating the episode, in addition to the matter reported above, said:

"Hamilton agreed with us in all these points except as to the power of the House to call on the heads of departments. He observed that as to his department, the act constituting it had made it subject to Congress in some points, but he thought himself not so far subject as to be obliged to produce all the papers they might call for. They might demand secrets of a very mischievous nature. (Here I thought he began to fear they would go on to examining how far their own members and other persons in the government had been dabbling in stocks, banks etc., and that he probably would choose in this case to deny their power; and in short, he endeavored to place himself subject to the House, when the Executive should propose what he did not like, and subject to the Executive when the House should propose anything disagreeable.) . . . Finally agreed, to speak separately to the members of the committee, and bring them by persuasion into the right channel. It was agreed in this case, that *there was not a paper* which might not be properly produced; that if they should desire it, a clerk should attend with the originals to be verified by themselves."

As related in Freeman's biography of Washington:

"The copies of St. Clair's reports, covered by this message were sent precisely as received, and when published, they were complete. Not even the ugliest line on the flight of the beaten troops was eliminated. Washington had learned long previously the protective value of candor in dealing with the American people and he knew that one reason for their trust in him was their belief he would tell them the whole truth."⁴²

In the light of this more complete account of this episode, can it possibly be argued that it sustains the Justice Department position, or that it supports Wolkinson's statement that the Executive has always prevailed?

The House demanded the papers. The Cabinet agreed that the House might institute inquiries. It thought it might call for papers. It thought the President should exercise discretion, but *in this case decided to make all the papers available*. It felt the House inquiry should have been directed to the President and not his department heads, but all the papers were nonetheless produced.

The House, of course, could not control the expression of the views of the President or the Cabinet, but, in this case, it got what it asked for, without any reservation whatsoever.

If this case is a precedent for anything, it is a precedent to show that the first President was in favor of disclosure, as a principle of government, and as a constitutional matter, except in some possible instances which might later arise, but which in this affair did not exist.

THE JAY TREATY

The second historical episode that is cited is that involving the request of the House of Representatives for the instructions and papers furnished our ambassadors who negotiated the Jay treaty.

This no more sustains the claim to sweeping powers of non-disclosure than the first episode. Here, President George Washington refused the papers on the sound and specific constitutional ground that the Senate and not the House was entrusted with authority to advise and consent on the making of treaties. It was because he did not acknowledge that the House was involved in the treaty-making power that he denied the requested papers. This is made plain in the quotations from the President's message by the Department of Justice.

The issue involved appears with greater clarity as a result of a subsequent situation involving diplomatic papers in which President John Adams did respond to a House resolution under conditions that made the House request constitutional.

On Monday, April 2, 1798, the House called up the following resolution:

"Resolved, That the President of the United States be requested to communicate to this House, the instructions to, and despatches from the Envoys Extraordinary of the United States to the French Republic, mentioned in the Message of the 19th instant" [which reported the failure of the negotiations with France].⁴³

⁴² 6 FREEMAN, BIOGRAPHY OF WASHINGTON 339 (1948-57).

⁴³ 8 ANNALS OF CONG. 1370 (1798).

It was then proposed to add the following amendment: "excepting such parts of said papers as any existing negotiation may render improper to be disclosed."

Then Mr. Nicholas said he "did not think it would be right in the present situation of things—when we are told by the President that the negotiation with the French Republic is at an end, and that there is no chance of an accommodation taking place between the two countries—to agree to any exception of this kind. Called upon to act in this desperate state of things, he thought it would not be right for any part of the papers which had led to it to be withheld from Congress. The President having thought fit to declare that all negotiation is at an end, that he is without hope of an accommodation, it could not be thought proper that the Legislature should be called upon to act upon less information than that upon which the President himself had acted. He thought the Constitution must have intended this when it placed the power of declaring war in their hands; to suppose the contrary, would be to suppose an absurdity."

The author of the amendment wished to withdraw it rather than have a vote on it (that seemed likely to be unfavorable) and in so doing stated that he thought the President had the constitutional power to withhold such parts of the papers as he felt it improper to communicate.

Mr. Harper said, "the present call for papers stood upon a very different ground from that made when the British Treaty was under consideration; the objections, of course, against that call would not apply in the present case, as the papers now called for were wanted to throw light upon a subject confessedly within the Constitutional powers of the House. He therefore held the call not only to be constitutional but expedient. Nor could he see any ground for the amendment: if the House had a Constitutional right to ask for information, they had a right to ask for the whole information, and the President would judge how far he could with propriety comply with the call. But since the House did not know that the communication of any of these papers would be improper, the whole ought to be called for; and, if the President should think it proper to retain a part, he would doubtless give sufficient reasons to the House for doing so. On a former occasion when it was moved to modify the resolution calling for papers in the way now proposed, the motion was rejected, because it went to alter the principle contended for; and he believed the same reason would lead to a rejection of the present motion."⁴⁴

The amendment was then defeated and the resolution itself adopted, by a vote of 65 to 27.

On April 3 the President sent a message to Congress stating:

"In compliance with the request of the House of Representatives expressed in their resolution of the 2d of this month, I transmit to both Houses the instructions to and despatches from the Envoys Extraordinary of the United States to the French Republic, which were mentioned in my Message of the 10th of March last, omitting only some names, and a few expressions descriptive of the persons."

What now of the allegation that "the Executive has always prevailed"?

⁴⁴ *Id.* at 1369.

Here is a perfect illustration of the limits of executive privilege, of the difference between a request that was unconstitutional because it exceeded the powers of the House, and one that was constitutional because it was within the powers of the House. There is, as well, an illustration of the readiness of the House to accept the sound reasons of the executive for withholding the names that went down in history as participants in the XYZ affair.

It is not to be overlooked that the disclosure of the instructions to our ambassadors in the matter of the Jay treaty would have divulged to a hostile House that the embassy had achieved few of the things it was instructed to obtain. And it is not to be forgotten that Adams dealt the House Republicans a sharp political rebuff by the XYZ disclosures.

PRESIDENT JEFFERSON'S ADMINISTRATION

The House of Representatives' demand upon Thomas Jefferson for the papers in the Burr case is next cited. It is not easy to discover what this episode proves about executive prerogative. In making its request, the House asked for no papers "such as he may deem the public welfare to require not to be disclosed."

Even though the resolution itself exempted papers the President thought should not be disclosed, Jefferson felt obliged to explain the nature of the papers that he did not convey, that is, matter "chiefly in the form of letters, often containing such a mixture of rumors, conjectures, and suspicions as renders it difficult to sift out the real facts and unadvisable to hazard more than general outlines, strengthened by concurrent information or the particular credibility of the relator. In this state of the evidence, delivered sometimes too, under the restriction of private confidence, neither safety nor justice will permit the exposing names, except that of the principal actor, whose guilt is placed beyond question."

The House invited the President to withhold everything that he thought the public welfare required not to be disclosed. He complied with its request, and exceeded it because he was not content to exercise an outright discretion without full explanation of what he withheld and why he withheld it.

What does this prove? Is this another of the situations in which the executive has unvaryingly prevailed? When the President does not disclose papers he was not asked to divulge, does this shed much light on his right to the sort of privilege the Justice Department memorandum claims for the office?

It should be noted at this point, that the Burr trial is often cited as an example of executive refusal to comply with a subpoena duces tecum. In his remarks during the Burr trial, Chief Justice John Marshall had indicated that he would require the attendance of the President and asserted the power of the Court to compel his attendance. But when the writ was drawn up, it contained this statement:

"The transmission to the Clerk of this Court of the original letter of General Wilkinson, and of copies duly authenticated of the other papers and documents described in the annexed process, will be admitted as sufficient observance of the process, without the personal attendance of any or either of the persons named."

"Thus Marshall did not issue the challenge to the President which he had indicated in court that he would issue, and consequently historians have been misled into believing that Jefferson defied the order of the Chief Justice."⁴⁵

The Burr trial did produce, in the oral remarks of the Chief Justice, a sweeping assertion of judicial power and in the statements of Thomas Jefferson, equally sweeping allegations of executive immunity to judicial process, but it was a debate, not a legal collision.

THE JACKSON EPISODE

The Attorney General's memorandum next cites a case in the Jackson administration. The example cited—that of an investigation of a Jackson appointee accused of land frauds—undoubtedly is to the point but it probably is not one that any modern President, in the same circumstances, would follow.

There is a curious twist in this episode. One of Jackson's reasons for refusing the information was that the Senate was investigating the matter in secret sessions under circumstances that would deprive the accused of one of his basic rights—"that of public investigation in the presence of his accusers and of the witnesses against him." Executive secrecy was thus invoked in response to Senate secrecy.

President Jackson's disputes over yielding information to Congress were frequent.

In the light of his refusal to yield land fraud papers (noted in the Department of Justice summary), it is remarkable that in his celebrated "protest" of a Senate censure resolution in 1834, he said:

"Cases may occur in the course of its legislative or executive proceedings in which it may be indispensable to the proper exercise of its powers that it should inquire and decide upon the conduct of the President or other public officers, and in every case its constitutional right to do so is cheerfully conceded."

Jackson refused to comply with Senate and House requests on many occasions.

On December 12, 1833, he refused a Senate request for copies of a statement he was alleged to have made to the heads of his executive departments.

On January 6, 1835, he rejected a House request for communications over the northeastern boundary dispute, settlement of which was then "in progress."

Against these examples of President Jackson's flat refusal to convey requested papers, there also must be set his repeated, if sometimes reluctant, acquiescence to the demands of Congress. These affirmative responses were very numerous.

On January 7, 1834, he sent the House a copy of a contract for the construction of a bridge across the Potomac, together with all the information the Secretary of the Treasury "is now able to communicate" on the subject.

On February 12, 1834, complying with a House resolution, he transmitted to the House a list of presents received from foreign governments by officers of the United States, on deposit in the State Department.

⁴⁵ ABERNETHY, *THE BURR CONSPIRACY* 238 (1954).

On March 8, 1834, responding to a House resolution, he sent up instructions and other papers in connection with trade with Cuba and Porto Rico.

On March 20, 1834, in response to a Senate resolution, he sent up copy of instructions given the U. S. Minister to Great Britain and of correspondence between the Minister and the British Government on the condemnation of the ship Olive Branch.

On June 13, 1834, Jackson angrily replied to a Senate resolution asking for the first "official communication which was made to Andrew Stevenson of the intention of the President to nominate him as minister plenipotentiary to England and Ireland." He said compliance might be deemed an admission of Senate right to confidential correspondence of this description and that he did not acknowledge such a right. But, he added, "*to avoid misrepresentation I here with transmit a copy of the paper in question, which was the only communication made to Mr. Stevenson on the subject.*"

On January 13, 1835, Jackson sent to the House "copies of every circular or letter of instruction emanating from the Treasury or War Department since the 30th Day of June last, and addressed to either the receiving or disbursing officers stationed in States wherein land offices are established." This was in response to a House resolution.

On the same day, Jackson angrily reproached the Senate for a resolution demanding a copy of any report made to him by any director of the Bank of the United States with reference to certain notes and bills of exchange. He thought the request improper. *However, he said, "for the purpose of preventing misapprehension and injustice, I think it proper to communicate herewith a copy of the only report made to me by any director or directors."*

There were further affirmative responses to Congressional requests for various information on these 1836 dates: February 9, 10, 15, 18 and 29, April 8, May 14, 27 and 27, and July 1.

It is thus not accurate to say of even the Jackson administration that "the President always prevailed."

THE TYLER CASE

President Tyler's message to Congress on the Cherokee Indian matter is cited next in the Department of Justice memorandum. And the message should have a place in any collection of comment on executive prerogative.

The House of Representatives had called upon the President for reports made to the Department of War by Lt. Col. Hitchcock in the investigation of affairs of the Cherokee Indians, together with all information about frauds he was to investigate, and also all the facts in possession of the executive.

The House was not content with the partial information given it and at its next session renewed its request in more sweeping terms.

The most pertinent paragraph of Tyler's eloquent argument states:

"If by the assertion of this claim of right to call upon the Executive for all the information in its possession relating to any subject of the liberation of the House, and within the sphere of its legitimate powers, it is intended to assert also that the Executive is bound to comply with such call without the authority to exercise any discretion on its part in reference

to the nature of the information required or to the interests of the country or of individuals to be affected by such compliance, then do I feel bound, in the discharge of the high duty imposed upon me 'to preserve, protect and defend the Constitution of the United States', to declare in the most respectful manner my dissent from such a proposition."⁴⁶

The able message of President Tyler is not an assertion of an "uncontrolled discretion" or unlimited right to withhold. With great care it enumerates some of the particular situations in which matters must be kept confidential: pending law enforcement investigations, incomplete inquiries before their truth or falsity has been ascertained, all papers "merely" because they concern matters about which the House is deliberating. He challenges this as the sole test of availability (and who wouldn't). He thinks "certain communications and papers are privileged" and that "the general authority to compel testimony must give way in *certain cases* to the paramount rights of individuals and the government."

This is a strong and an able argument for executive prerogative "in certain cases" and an effective presentation of the claim of discretionary power.

However, the Department of Justice memorandum refers not only to the message but to "President Tyler's *refusal* to communicate to the House of Representatives the reports relative to the affairs of the Cherokee Indians and to the frauds which were alleged to have been practised upon them."

As a matter of fact, while making a statement of principle, President Tyler, nevertheless, did give the House what it asked for. In the very message discussed, he said:

"I have thought proper to direct that the report of Lt. Col. Hitchcock concerning the frauds which he was charged to investigate be transmitted to the House of Representatives, and it accordingly accompanies this message."

Tyler said he did this to "avoid even the appearance of a desire to screen any, and also to prevent the exaggerated estimate of the importance of the information which is likely to be made from the mere fact of its being withheld."

He sent along all the facts about the Cherokees except some correspondence "not supposed to be within the intent of the resolution."

He assured the House that "all the papers in the War Office or its bureaus known or supposed to have any relation to the alleged frauds which Lt. Col. Hitchcock was charged to investigate are herewith transmitted."⁴⁷

How does this comport with Mr. Wolkinson's statement that "in the great conflicts which have arisen, the administrations of Washington, Jackson, Tyler, Cleveland, Theodore Roosevelt and Herbert Hoover, *the Executive has always prevailed?*"

In most of Mr. Wolkinson's examples, the Congress prevailed, and got precisely what it sought to get. In the case of the Jay Treaty, the President prevailed, but not on the broad ground of executive prerogative but on the solid ground that the House lacked constitutional authority to advise and consent on

⁴⁶ 4 MESSAGES AND PAPERS OF THE PRESIDENT 222 (1896-99).

⁴⁷ *Id.* at 225.

treaties. The Jackson episode, of all those prior to the Buchanan administration, seems to be the only instance in which it might be said that "the executive prevailed" in an assertion of absolute, unqualified discretionary right to withhold.

Some of the other and later examples ought to be explored under circumstances in which time and space permit. Certainly, the examples prior to the Civil War period, in the Department of Justice's own memorandum, in the light of history, do not support either the conclusion of Mr. Wolkinson who first compiled this information or the broad assertions of the Justice Department. Historical fact simply is overwhelmingly at war with the law as the Attorney Generals prefer to view it.

Pertinent and interesting as later cases may be, the early cases here examined arose during the years when the government was taking shape and no subsequent examples could shed more light on the nature of this separation of powers.

CONCLUSION

The withholding of information by executive agencies of the Federal Government, over the generations, has steadily increased until now it threatens to deprive citizens of the knowledge essential to self-government and indispensable to a determination by the people of the adequacy of policy and the fidelity of individual public servants.

The means of reestablishing the right-to-know about executive agencies are readily at hand and involve changes consonant with constitutional principles and sound public policy, including:

(1) Adoption by the executive departments and agencies of a philosophy and theory of executive privilege that acknowledges the presumption in favor of disclosure inherent in all self-governing societies and made explicit in our own system by the First Amendment and its assurance of the citizen's right to "acquire" and to disseminate information, without abandoning the premise that there resides in the executive the right and duty to respect other constitutional provisions, specific statutory enactments, international practice and individual rights which, on occasion, require non-disclosure and oblige Congress and the courts alike to acquiesce in executive discretion asserted under these exceptional circumstances.

(2) Amendment of 5 U.S.C. § 22 so as to make it clear that Congress has not intended to sanction all withholding by executive departments, without limit, definition or restriction, and so as to restore a situation in which non-disclosure must be supported by express and specific limitations on the right to know under standards that thereby permit judicial review. (Accomplished since this article was prepared.)

(3) Amendment of the Administrative Procedures Act so as to assert the right of citizens as well as that of litigants and their clients to information involved.

(4) Congressional review of the more than sixty express statutory provisions providing for specific non-disclosure with a view to their curtailment where they seem to impose unnecessary secrecy or their expansion where security seems to require more explicit protection.

(5) Congressional reexamination of disclosure statutes that expressly require release of information with the object of expanding and more clearly defining such areas.

* * * *

The limits separating the powers of one branch of our government from another no doubt always will resist precise legal definition. The prerogative by Congress, the Executive and the Courts are not matters of law alone, but are often altered by fluctuating political power. Many of these issues will remain unsettled because the means of settlement available to all branches would involve contests too painful to be borne. There will be in the future, as there have been in the past, assertions of right by one branch, which the other branches neither contest over nor acquiesce in, and it always will be unsafe to judge as settled law contentions that have been met with silence by two out of three of the grand departments. So must the extreme statements of executive prerogative be regarded. And so must the most extreme statements of Congressional power be viewed.

The public's access to information, too, will depend in the end not only upon the constitution and the laws, but upon the climate of opinion and the genius of public institutions and the play of political forces. Perhaps it really will be these political forces that, in the end, will be the most effective in determining the extent to which doors of executive departments now shut and fastened against the inquiry of citizens will be opened to them.

Mr. SLAYMAN. The last, Mr. Chairman, are two law review articles from the Georgetown Law Journal, one on the power of congressional committees of investigation to obtain information from the executive branch, the argument for the legislative branch, and the other is the power of the Executive to withhold information from congressional investigating committees.

Senator O'MAHONEY. Without objection, it may be received for the record.

GEORGETOWN LAW JOURNAL,
THE LAW CENTER,
GEORGETOWN UNIVERSITY,
Washington, D.C., March 12, 1959.

MR. CHARLES H. SLAYMAN, JR.,
Chief Counsel and Staff Director, Senate Subcommittee on Constitutional Rights,
U.S. Senate, Washington, D.C.

DEAR MR. SLAYMAN: In compliance with your request, the Subcommittee on Constitutional Rights is hereby granted permission by the copyright owners of the Georgetown Law Journal to reproduce for the record of a public hearing on "Executive Privilege" the articles listed below:

(1) "The Power of Congressional Committees of Investigation To Obtain Information From the Executive Branch: The Argument for the Legislative Branch" by Philip R. Collins. The Georgetown Law Journal, volume 39, page 603.

(2) "The Power of the Executive to Withhold Information From Congressional Investigating Committees" by Richard P. Milloy. The Georgetown Law Journal, volume 43, page 643.

Sincerely yours,

THOMAS M. HADERLEIN,
Managing Editor.

(The documents referred to follow:)

THE POWER OF CONGRESSIONAL COMMITTEES OF INVESTIGATION TO OBTAIN INFORMATION FROM THE EXECUTIVE BRANCH: THE ARGUMENT FOR THE LEGISLATIVE BRANCH*

PHILIP R. COLLINS**

CONGRESSIONAL committees of investigation have, in recent decades, become a part of our national scene. These committees, their members and tactics make good copy for column one, page one of our large metropolitan newspapers. More than one member of Congress has won favorable notice and political advancement by reason of his activities on such committees.¹

A participation in the ever-current debate as to whether a congressional committee is a force for good or for evil in our democratic form of government is not the purpose of this article.² Nor are we concerned with the right of a witness or an "accused", as he may be popularly called, to representation by counsel and to cross-examination of witnesses. This question has been properly and fully examined by other writers.³ Nor need there be a discussion of a question fully covered by both the courts and writers in legal periodicals through the years—the right of congressional committees of investigation to punish for con-

* A more elaborate treatment of this subject and related problems is contained in a doctoral dissertation submitted to the Department of Political Science, The Graduate School, Georgetown University. See, Collins, *A Problem in American Constitutional Law: The Power of Congressional Investigating Committees to Require Information from the Executive* (Georgetown University, June 1950).

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¹ Senators Mundt of South Dakota and Nixon of California are examples of Congressmen who have risen to the upper chamber because of the publicity received from their service on congressional investigating committees.

² Boudin, *Congressional And Agency Investigations: Their Uses and Abuses*, 35 Va. L. Rev. 143 (1949).

³ E.g., Lord, *The Lawyer and the Congressional Investigation*, 21 So. Calif. L. Rev. 242 (1948); Wyzanski, *Standards for Congressional Investigations*, 3 The Record, N. Y. C. Bar Assn. 93 (1948).

tempt.⁴ In this article, the writer merely proposes to discuss the power of these committees to obtain information and documentation from the executive branch of our government.

INTRODUCTION

The problem, then, which confronts us, may be restated in one question: Should Congress, through the medium of its investigating committees, be allowed to require the executive branch of our government to furnish them with information which is deemed necessary by the legislative branch, in order to legislate wisely and in the public interest? This problem, which has seemingly remained unresolved through the years, and which usually lies dormant in times of war or national emergency, was resurrected during the Eightieth Congress.

Over the years, the executive branch has developed a stock answer or argument to such requests when it has not desired to furnish the requested information or documents. This stock response of the executive branch will be referred to herein as the "precedent" argument, because, prior to a citation of examples which supposedly buttress his position, the head of an executive department will respond substantially as follows to the committee requesting the information: To conclude that the public interest does not permit general access to these reports, I am following the conclusions reached by a long line of distinguished predecessors in the executive branch of the Government who have taken the same view.⁵

The writer will then cite and, if the matter is of major importance, will elaborate on a series of incidents in which the executive branch refused to submit information to congressional investigating committees. According to the usual method, these examples will begin with the refusal of President Washington's Secretary of War to furnish certain original letters and documents, on Washington's advice, to a congressional committee investigating the failure of the campaign of General St. Clair and could continue down to the refusal of the Department of Commerce, during the Eightieth Congress, to furnish informa-

⁴ E.g., *McGrain v. Daugherty*, 273 U. S. 135 (1927); *In re Chapman*, 166 U. S. 661 (1897); Dimock, *Congressional Investigating Committees* (Johns Hopkins Press, 1938); Eberling, *Congressional Investigations* (Columbia Press, 1927); Landis, *Congressional Power of Investigation*, 40 Harv. L. Rev. 153 (1926).

⁵ E.g., the statement of Vincent C. Burke, Acting Postmaster General, delivered before a sub-committee of the Senate Post Office and Civil Service Committee, 80th Cong., 2d Sess., Thursday, May 20, 1948 (unpublished).

tion to the committees concerning the F. B. I. loyalty report on Dr. Edward U. Condon, Director of the Bureau of Standards.⁶ The executive branch argues further that no Congress has dared to endeavor to force the head of an executive department to submit information, once there has been a formal refusal by the executive department to do so.

The second argument advanced by the executive branch is that the courts have repeatedly held that the executive cannot be required to produce such papers when their production is, in the executive's opinion, contrary to the public interest. This argument states further that whether or not the production of such papers is in the public interest is a question for the executive and not for the courts to determine. Citations of federal and state court decisions are used to buttress this statement. The genesis of this legal argument is to be found in a formal opinion of Attorney-General Robert H. Jackson, a member of the Roosevelt Cabinet in 1941, in response to a request for information from a congressional investigating committee.⁷

The tendency of the American press and public has been to uncritically accept these arguments of the executive branch. The fact is that the concept of the "inquisitorial" tribunal, does not fit comfortably into the minds of Americans raised in a tradition of Jeffersonian or Lincolnian liberalism. Nor was the popular view rendered more cordial toward

* Random examples usually cited by the executive branch include: (1) President Washington's refusal to give the House copies of his instructions to Minister John Jay concerning the negotiation of a treaty with Great Britain in 1796; (2) the refusal of President Jefferson to turn over information on the Aaron Burr incident to the House; (3) President Jackson's refusal to send to the Senate copies of the charges made against Gideon Fitz, the Surveyor-General; (4) President Tyler's refusal to disclose to the House the names of applicants and their mode of application for office; (5) the refusal of President Tyler to communicate information concerning Colonel Hitchcock's negotiations with the Cherokee Indians; (6) President Polk's refusal to forward an accounting to the House of all payments for contingent expenses of foreign intercourse; (7) President Buchanan's protest against a resolution creating a committee to investigate his attempts to influence Congress; (8) President Grant's reply to the House when it demanded to know whether he performed executive functions while away from the seat of the government; (9) the message of President Theodore Roosevelt informing the Senate of his instructions to the Attorney-General not to reply to a resolution directed at the latter inquiring as to his inaction in not prosecuting the U. S. Steel Corp. because of its absorption of the Tenn. Valley Coal and Iron Corp.; (10) the refusal of J. Edgar Hoover to testify as to certain matters, relating to the internal security and the activities at Pearl Harbor, at the direction of the Attorney-General's Executive Assistant, during an investigation of the F. C. C. See also the Burke statement, *supra* note 5; Wolkinson, *Demands of Congressional Committees for Executive Papers*, 10 Fed. B. J. 107 (1949).

⁷ 40 Op. Atty. Gen. 45 (1941).

investigating committees by the Kleig light and Hollywood ballyhoo technique which, with dubious judgment, was employed by congressional investigating committees of recent memory.

The arguments of the executive branch, under the microscope of careful examination, are not unimpeachable. The "precedent" argument can be countered, as the following paragraphs will attempt to show, by strong arguments on the part of the legislative branch. And the "legal" argument is equally questionable.

THE REPLY OF THE LEGISLATIVE BRANCH TO THE *Precedent* ARGUMENT OF THE EXECUTIVE BRANCH

The answer of the legislative branch of our government to the claim of the executive branch is to be found in the debates and proceedings of the two houses of our Congress. There are two series of debates to be considered,—one of the Senate during the Forty-ninth Congress, First Session, in March, 1886,⁸ and the other in the House of Representatives during the Eightieth Congress, Second Session, in May, 1948.⁹

The discussion in the Congressional Record for the Forty-ninth Congress, First Session, on the proposed resolutions to censure the Attorney-General for refusing to give the Senate certain information furnishes interesting data pertinent to the position of the legislative branch on the issue which is the topic of this study. In the Eightieth Congress, Second Session, there was introduced House Joint Resolution 342:

Directing all executive departments and agencies of the Federal Government to make available to any and all standing, special, or select committees of the House of Representatives and the Senate, information which may be deemed necessary to enable them to properly perform the duties delegated to them by the Congress.¹⁰

The legislative history of this resolution,¹¹ and allied documents,¹²

⁸ 17 Cong. Rec. 2211-2815 (1886).

⁹ 94 Cong. Rec. 5704 (1948).

¹⁰ H. J. Res. 342, 80th Cong., 2d Sess. (1948).

¹¹ H. R. Rep. No. 1595, parts I and II, 80th Cong., 2d Sess. (1948); 94 Cong. Rec. 5704 (1948).

¹² See memoranda of Mar. 10, 1948 and Dec. 30, 1947 from the Federal Law Section, Library of Congress to Congressman Hoffman reprinted in the Appendix to H. R. Rep. No. 1595, part I, 80th Cong., 2d Sess. 14 (1948); H. R. Rep. No. 1753, 80th Cong., 2d Sess. (1948), directing the Secretary of Commerce to transmit to the House a letter concerning Dr. Edward U. Condon; see also message of President Truman vetoing S. 1004 which concerned the grant of specific authority to Senate members of the Joint Committee on Atomic Energy to require investigations by the F. B. I. of persons nomi-

furnishes the material for the second part of the response to the "precedent" argument of the executive branch.

During President Cleveland's first term, in March 1886, the Senate censured the Attorney-General, Mr. Garland, a former Senator from Arkansas, for his failure to furnish the Senate Judiciary Committee with information and papers relating to the suspension of George N. Duskin, a Republican, as United States Attorney in an Alabama District. The Truman Administration, in its recent struggle with the Congress, cited the debates in 1886 on this subject as a victory for their position, since Cleveland's Department of Justice was not forced in any way to submit the requested information. It is to be noted, however, that the action of the Attorney-General was condemned by the Senate in four separate resolutions, the most important of which probably was the second, in which the Senate stated expressly:

... its condemnation of the refusal of the Attorney-General, under whatever influence, to send to the Senate copies of papers called for by its resolution of the 25th of January, and set forth in the report of the Committee on the Judiciary, as in violation of his official duty and subversive of the fundamental principles of the Government and of a good administration thereof.¹³

An attempt by Senator Morgan of Alabama, after the passage of the four resolutions, to amend the same by a tricky procedural move, failed. The attempted amendment, submitted in the form of a resolution, read as follows:

Resolved, That nothing in these resolutions contained is to be construed as declaring that the conduct of the Attorney-General renders him liable to impeachment, and the Senate disclaims the right or power to punish him by imprisonment or otherwise than by impeachment for the offense charged against him in the second resolution, which the Senate has just adopted. (Emphasis supplied.)¹⁴

This resolution was defeated by a sly maneuver of the Majority Leader, Senator Hoar of Massachusetts. When Hoar's point of order that the amendment was not timely, failed, and the President *pro tem* ruled that Senator Morgan clearly had the right to offer the amendment, Hoar then asked that this be allowed by unanimous consent, rather than by order, for he felt that "it would embarrass the Senate . . . very much

nated for appointment under the Atomic Energy Act of 1946, reprinted in 94 Cong. Rec. 6196 (1948).

¹³ 17 Cong. Rec. 2211 (1886).

¹⁴ *Id.* at 2814.

to establish such a precedent."¹⁵ Then, hastily, Senator Hoar moved to lay the resolution on the table. His motion carried by a vote of thirty-three yeas to twenty-six nays with sixteen members absent. The effect of this motion was to reject the resolution to amend.¹⁶ By such a rejection, the majority in the Senate made it clear that they were in no way excusing the Attorney-General from possible impeachment and that they were not renouncing what they considered to be their legal right to punish him by imprisonment, or otherwise than by impeachment for his refusal to submit to the committee the desired information.¹⁷

This hardly seems, therefore, to be a case which could or should be cited by the executive in support of that branch's "precedent" argument. In this situation, the Senate, in effect, said: We censure you, Mr. Gar-

¹⁵ The following colloquy, contained in 17 Cong. Rec. 2814 (1886), is pertinent:

"Mr HOAR. I desire to raise a question of order. All the resolutions have been passed, the whole four. There is no mode of amending the series now. It is simply like dividing the vote on the passage of a bill into four parts, and when they are all passed upon you can not move to amend the bill after it has been passed.

"The PRESIDENT *pro tempore*. The Chair is of opinion that in view of the notice given by the Senator from Alabama that he would offer an amendment, and the amendment having been sent to the desk, the question being raised as to whether he could or could not offer it, the resolution should be received.

"Mr. HOAR. To what is it an amendment? An amendment implies a pending question to be amended. The question is, Shall the bill pass? The question, shall it pass with a certain amendment, must be acted on before it is passed. But when a series of resolutions which are four distinct propositions are before the Senate and there is a demand that the question be divided, according to the usual parliamentary procedure the question is put on the passage of each separately, and when each separately has passed the matter is as much beyond the reach of amendment as a bill after it has passed. Giving a notice beforehand does not change the parliamentary law. The Senator should have made his motion as an amendment to the last resolution.

"The PRESIDENT *pro tempore*. In ordinary cases clearly the Senator from Massachusetts is right; but the Senator from Alabama sent an amendment that was then in order to the Chair, and the Chair was about to put the question upon it as an amendment when the Senator from Alabama gave notice to the Senate that he would offer it as an additional resolution. The Chair thinks under the circumstances that it is clearly his right to offer the amendment."

¹⁶ The following definition of a "motion to lay on the table" is to be found in Cannon, *Procedure in the House of Representatives* (U. S. Govt. Printing Office, 1948) p. 415 and is equally applicable in regard to the Senate:

"The motion to lay on the table is used for final and summary disposition without debate, and to protect the House against business which it does not wish to consider, and while it is not a technical rejection, it is in effect an adverse disposition equivalent to rejection."

¹⁷ 17 Cong. Rec. 2814 (1886).

land, because you have not given us the information we requested; we do not force you to give us the information, but this does not mean that we do not think we have the power to do so. Nor, by these resolutions, are we waiving such power.

These debates of 1886, consuming some seventeen days, present additional information in support of the legislative branch's position and in rebuttal of the argument, based on precedent, advanced by the executive branch.

The novel arguments, supporting the position of the legislative branch, were mainly advanced by Senator Edmunds of Vermont, a member of the Republican Party and the Chairman of the Senate Judiciary Committee during the Forty-Ninth Congress, in the debate on the general subject of the relations between the Senate and Executive Departments.¹⁸ The Senator's first argument was based on Article II, Section 3 of the Constitution of the United States. Article II, of course, deals with the powers of the Executive and Section 3 specifically provides that the Chief Executive:

... shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient; ¹⁹

The Senator gave a broad definition to the term, "state of the union", and argued that the Constitution commands the President in affirmative terms to give such information to the two houses of Congress and that when the Constitution so refers to "state of the union", it has reference to the

... universal power of knowledge and information of the two Houses of Congress in respect to every operation of the Government of the United States and every one of its officers, foreign and domestic.²⁰

The Senator continued in the following words:

That is the "state of the Union." The "state of the Union" is made up of every drop in the bucket of the execution of every law and the performance of the duties of every office under the law, either within its borders or out of it. There is no one mass, no one cue, or quantity, or subject that makes up "the state of the Union", as every gentleman—and there are a good many here who have been members of the House of Representatives, when they go into the Committee of the Whole on the State of the Union—knows. It is the condi-

¹⁸ *Id.* at 2211.

¹⁹ U. S. Const., Art. II, § 3.

²⁰ 17 Cong. Rec. 2215 (1886).

tion of the Government and every part of it, not only its legislative part about which the President of the United States could communicate no information without impertinence, for the Constitution has declared that the two Houses are to regulate themselves, but he is to give to Congress, as a positive command, from time to time, information on the state of the Union; and that is because they are entitled to have it, and they are entitled to have it every time they call for it, and he violates a positive command of the Constitution when on a constitutional call and in a regular way by either House he omits to do it.²¹

For this reason, Edmunds continued, from our earliest Congresses, the Chief Executive has been given much leeway by the legislative branch in determining whether the public interest would be preserved or injured by forwarding certain information to the Congress or to a committee of the Congress. This was particularly true where undue and premature disclosures of confidential fact would be involved in forwarding the information to a committee, even though the committee was entitled to have such information. Following the line of reasoning above outlined, however, this Republican leader reached the conclusion that either House of Congress had a "right to know everything that is in the Executive Departments of the Government."²²

From his research, the Senator stated that this was the first instance in forty years in which either House had failed "on its call to get information that it has asked for from the public Departments of the Government."²³ In all the history of our country, up to his era, declared the Senator, there had been few instances in which there was evinced the slightest reluctance on the part of either the executive or the departments to respond to calls of either House or of their committees for papers in the possession of the former.

Sometimes in a case of *political fever*, as it might be called, they have evinced, wide years apart, a reluctance and a hesitation on the part of the executive or of the heads of Departments to do this thing; and then, that storm being over, the orderly administration of constitutional government went on as before, and either House of Congress on its request or demand, as the case might be, and the committees of either House of Congress acting without a direct and positive authority to send for persons and papers, have always obtained from the Departments on their mere request everything that either House or its committees thought necessary for the proper discharge of their duties. (Emphasis supplied.)²⁴

²¹ *Ibid.*

²² *Ibid.*

²³ *Ibid.*

²⁴ *Ibid.*

The Senator from Vermont continued his attack on the position of the minority of the committee, who had cited a few incidents in which the executive department refused to furnish papers or information to one of the Houses of Congress. He pointed to the numerous occasions on which Presidents actually furnished such information to congressional committees even on subjects which were, indeed, more confidential than the subject then under consideration, and some of which were as confidential as the information which Washington refused to furnish concerning Jay's treaty.²⁵ His argument, supported by these numerous citations, is that the Presidents realize their responsibility to submit information to the Congress, whether based on the "state of the Union" requirement or otherwise; and that when Presidents refuse to furnish such information, they do so not on constitutional but on purely political grounds.

[The willingness displayed by the executive branch in furnishing information to the various committees and to the respective Houses of Congress, in the period prior to Cleveland's first administration, is best observed by a perusal of some of the examples cited by Senator Edmunds in his argument on the opening day of this debate in the Senate on March 8, 1886. The wide range of subjects involved in the submissions of information through the years is also worthy of notice.²⁶

In executive session on March 3, 1806, the President was requested to report all documents and papers relative to the interference of the American Minister at Paris in the case of the ship *New Jersey*. The President furnished this information although there was no question then pending in the Senate regarding either the ship *New Jersey* or the American Minister at Paris.²⁷

The President was requested by the Senate on June 2, 1813, to inform the Senate, and the Senate was so informed by the Chief Executive, whether any communications had been received from one Russell, an agent of the United States, admitting or denying the declaration of the Duke of Bassano, as to the repeal of the Berlin and Milan decrees. With respect to this Senator Edmunds said:

It has been stated that an agent of the United States had got (*sic*) that information and had given it away in an improper manner; but the detail it is quite unnecessary now to go into; . . . *in order*, I repeat, *to keep itself acquainted with the state of the Union* and the executive affairs of this Government and the

²⁵ Some of the occasions cited by Senator Edmunds are listed, *supra* note 6.

²⁶ 17 Cong. Rec. 2216 (1886).

²⁷ *Ibid.*

conduct of all its agents, proceeded to call for this information, and got it as a matter of course. It was not exercising a jurisdiction to confirm or reject Russell for anything, or to ratify or reject a treaty. It was getting information in a general way for its general purposes in the exercise of its general duty. (Emphasis supplied.)²⁸

The Senate Committee on the Judiciary was instructed on March 13, 1822, to procure from the Secretary of State a letter written by a Mr. Jennings of the State of Indiana, recommending one Dewey for appointment as United States Attorney for Indiana. The Senator indicated that the resolution instructing the committee to obtain this paper implied that the power to secure the same extended to a private paper, so far as such a paper can be a private paper, and described the document in question as being a letter that the Senate had reason to believe was in the files of our Department of State. The paper was turned over to the Committee without objection.²⁹

The Secretary of War was directed by the Senate on October 30, 1828, to furnish copies of the reports of the Inspector-General of the Army of the United States, confidential as well as others, including the details of all statements and instructions. This order, the Senator informs us, was adopted in executive session and was complied with by the Secretary of War as a matter of course.³⁰

The Senator similarly cited numerous other occasions on which the executive had without argument surrendered information to Congress.³¹ But of all the cases amassed by the Senator from Vermont in this discussion, his last probably had the most telling effect. In March and April 1879 the Senate Judiciary Committee, controlled by a Democratic majority, had sought and received from the Attorney-General, the same type of information which Cleveland and his Attorney-General, Mr. Garland, were refusing to submit to the Republican-controlled Senate Judiciary Committee in 1886. The information requested in 1879 concerned nominations for certain vacancies and also dealt with the propriety of the removal of one Michael Schaeffer, Chief Justice of the Supreme Court of the Territory of Utah and the appointment of David Corbin to that office. To cap the climax, Senator Edmunds gleefully noted that in 1879 some of the most famous Democrats of the era were on that

²⁸ 17 Cong. Rec. 2217 (1886).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ 17 Cong. Rec. 2219-2220 (1886); Josephson, *The Politicos* (Harcourt Brace & Co., 1938) p. 100 *et seq.*

Judiciary committee, three of whom were presently members of Cleveland's Cabinet, and one of whom was the present Attorney-General, Mr. Garland. The Democratic Senatorial Committee had asked for information and the Republican Executive had acceded to the request. Edmunds concluded his recitation of this incident with the following biting peroration:

Alas, for the Democracy of those days! Think sir, of the infinite idiocy, unpatriotism, usurpation of that number of five Senators of the United States of the Democratic Party assailing a Republican Attorney-General and a Republican President with the insulting and impertinent inquiry as to papers and information touching a man, to be removed whose successor was nominated to accomplish his removal. And yet those men were in their day and in those times among the headlights of the Democratic locomotives. There was Thurman—his light is put out—the greatest Democrat in the United States (applause in the galleries) and the best one, and the noblest one, and the bravest one, for he had the courage not long ago in your State, sir, to denounce the Democratic frauds on the ballot. There was Thurman, and there was Joe McDonald, a name familiar in the West as well as in the East as the embodiment of upright Democratic pluck and constitutional law; and there was Garland, whom we all knew here, the leader on the Democratic side of the Senate, and running over with constitutional and statute and reported law, knowing his rights as a Senator and as a member of the committee and knowing his duties; and Lamar, and then all the rest of us on this side, joining in what the present President of the United States calls an impertinent invasion of his rights in asking for information from him. Sir, if I was going to be rhetorical, I should say just here:

O shame! Where is thy blush? . . .³²

It is submitted that Mr. Edmunds presented well the answer of his era to the "precedent" argument of the executive branch. His answer is that there is no precedent for the statement that the executive branch may withhold information from the Congress and their committees of investigation, when the former branch feels that the submission of such information is for the public interest. He contends that, because of its responsibility to present to Congress information on the state of the union and otherwise, the executive branch must comply with requests for information and documents from the legislative branch and its committees. He supports this proposition by examples of the continued adherence of the executive branch to this norm and he shows that refusals are usually based solely on political and party arguments.

The Republican House majority in the Eightieth Congress carried this argument one step further. They passed a resolution requiring the

³² 17 Cong. Rec. 2221 (1886).